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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 449

E. W. CLARK, AS RECEIVER, PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY, AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1933

CERTIORARI GRANTED OCTOBER 23, 1933

SUPREME COURT OF THE UNITED STATES

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IN SUPREME COURT OF MONTANA

JOHN MIEYR, Respondent,

vs.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, a Corporation, and E. W. Clark, as Receiver of Federal Surety Company of Davenport, Iowa, Respondents; Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Common-law Trust, and Gordon Campbell-Kevin Syndicate, a Common-law Trust, Appellants

[Caption omitted]

[fol. 1] IN DISTRICT COURT OF EIGHTH JUDICIAL DISTRICT OF MONTANA IN AND FOR CASCADE COUNTY

[Title omitted]

Bill of Exceptions Prepared on Behalf of Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Common-law Trust, and on Behalf of said Last-named Syndicate

Be it remembered that on the 25th day of August, 1932, an Order, Judgment or Decree, hereinafter set forth, and entitled "Order Confirming Appointment of Receiver", wherein and whereby the alleged rights of the said Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, creditors of Defendant Federal Surety Company, herein, said alleged rights were claimed to be affected, was made and entered herein out of the presence of said Harry O. Williard, W. W. Wheaton and C. W. Hay, as such Trustees, and out of the presence of their attorneys, Louis P. Donovan and Belden & DeKalb, but after a hearing and argument of counsel were had and briefs were submitted; that theretofore, on the 24th day of May, 1932, the said above named creditors presented their Petition and secured from the Court an order [fol. 2] allowing the levy of executions, under judgments theretofore obtained by them, upon moneys belonging to

Federal Surety Company, which said Order, the Receiver appointed herein, D. A. Crichton, moved this Honorable Court on July 25th, 1932, to vacate, all as hereinafter set forth, and acted upon, as hereinafter set forth; and the Motion of said above named creditors filed herein on August 31st, 1932, attacking the said Order Confirming Appointment of Receiver, made and entered herein August 25th, 1932, which said Motion, as hereinafter set forth, was filed and came on for hearing, as hereinafter set forth, on August 31st, 1932, before H. H. Ewing, the Judge having jurisdiction of said cause, and that the said Motions and Orders were based upon the files and records and evidence, as herein set forth, and none other, all of which, in full substance, are in the words and figures as follows, to-wit:

That on the 25th day of March, 1932, Plaintiff filed his Complaint herein in the words and figures as follows, to-wit:

COMPLAINT—Filed March 25, 1932

Plaintiff complains of the defendants and alleges:

1

That on or about the 25th day of October, 1929, at Great Falls, Montana, for a valuable consideration, the plaintiff and Federal Surety Company made and entered into a certain contract of insurance in writing, a copy of which is hereto attached, marked Exhibit "A", and by this reference made a part hereof.

2

That on or about the 9th day of June, 1930, while said insurance was in full force and effect, the plaintiff suffered a loss from the liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered by one Elizabeth Mieyr, who, at the time, and at all [fol. 3] the times herein mentioned, was not a chauffeur or an employee of the plaintiff, which loss occurred in the State of Montana, United States of America, by reason of the ownership, maintenance, use and operation of an automobile specifically described in said contract, to-wit: a certain Chandler Sedan, Factory or Serial No. C 30857,

Motor No. C 30857, 1928 Model, while the Plaintiff was using the same for pleasure.

3

That immediately upon suffering said loss, plaintiff notified the authorized agent of the said insurance company of said loss and thereafter there was instituted in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, a certain action upon said loss or liability, in which the said Elizabeth Mieyr was plaintiff and the Plaintiff herein, John Mieyr, was defendant; that immediately upon the papers in said cause being served upon the plaintiff he notified and turned over said papers to the authorized agent of the Federal Surety Company, and the Federal Surety Company, by and through its Attorney, O. B. Kotz, entered an appearance in said suit by Demurrer, and the said Federal Surety Company undertook to defend the plaintiff herein in said suit, and that thereafter such proceedings were had that on the 22nd day of March, 1932, there was duly given and made in said Court, a Judgment against the Plaintiff herein, in the sum of Two Thousand, Seven Hundred Forty-two and 70/100 Dollars ($2,742.70), upon said liability imposed by law for damages on account of the bodily injury sustained by the said Elizabeth Mieyr.

4

That thereupon, and thereby, the said Federal Surety Company became indebted to the plaintiff in the sum of Two Thousand, Seven Hundred Forty-two and 70/100 Dollars ($2,742.70) no part of which has been paid, and the whole thereof is now due and owing from the said Federal Surety Company to the plaintiff.

[fol. 4] 5

That at all times herein mentioned prior to September 25th, 1931, the said Federal Surety Company was a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, and that on the 25th day of September, 1931, there was in full force and effect Section 8402 of the Code of Iowa of 1927 and of 1931, being Section 1640 of the Code of Iowa of 1897, which provides as follows:

"Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the State of Iowa. An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them."

and Section 8964 of the Code of Iowa of 1927 and of the Code of 1931, being Section 1731 of the Code of 1897, which provides as follows:

"The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents or stockholders of any insurance company doing business in the state, to examine into the affairs and conditions of any such company incorporated or doing business therein, or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any [fol. 5] company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a

distribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or the judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge."

and Section 8613-d1 of the Code of Iowa of 1931, being Chapter 233 of the Acts of the 43rd General Assembly of Iowa, which provides as follows:

"The commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership."

6

That on or about the 25th day of September, 1931, in the [fol. 6] District Court of the State of Iowa, in and for the County of Scott, in Equity Cause #28238, entitled "State of Iowa, ex rel, John Fletcher, Attorney General, vs. Federal Surety Company, of Davenport, Iowa," judgment was duly given and made in said cause, dissolving said corporation and appointing one E. W. Clark Receiver and/or Liquidating Officer of said corporation, to take title to all property of the dissolved corporation for the purpose of liquidating its affairs and distributing its assets as by law provided.

7

That the said Federal Surety Company is indebted to citizens of Montana, residing within the State of Montana in a sum in excess of Fifty Thousand Dollars ($50,000.00).

8

That the said Federal Surety Company has property within the State of Montana consisting of cash money in the hands of the Industrial Accident Commission for the State of Montana, in the sum of Twenty-five Thousand Dollars ($25,000.00); that the said Federal Surety Company has a judgment duly given and made by the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark against the Fidelity

and Deposit Company of Maryland, of the value of more than Fifteen Thousand Dollars ($15,000.00); that the said Federal Surety Company has in *d*ustodia legis within the State of Montana the sum of Ten Thousand Dollars ($10,000.00) and has the further sum of Three Thousand Five Hundred Dollars ($3,500.00) cash in hands of trustees in the State of Montana, and that the said R. W. Clark, through his agents and representatives, is now in the State of Montana attempting to compromise, settle and discount said assets and procure possession of such portions thereof as he can and remove the same out of the State of Montana, and that unless a Receiver is appointed within the State of Montana to take charge of said property, and preserve [fol. 7] the same for the creditors of this State, and the general creditors of the said Federal Surety Company, the same will be dissipated and lost to said creditors; that none of said sums can be levied upon by process issued from any Court of this State by attachment, execution or otherwise; that said Federal Surety Company is wholly insolvent and has been dissolved by a Court of competent jurisdiction by Order duly given and made in a proceedings properly instituted before said Court.

9

That unless a Receiver is appointed of the assets of said corporation within the State of Montana, the plaintiff and the creditors of the State of Montana will be compelled to go into a foreign jurisdiction to collect their debts or their proper proportion of the assets of said corporation, and to litigate the propriety of their debts or claims; that said funds should be maintained and retained within the State of Montana until the proportionate shares of the creditors of the State of Montana have been ascertained and determined and these decreed and paid out of the local assets before transferring any of the funds to the domiciliary administration or receiver.

10

That by the decree of the Court of Iowa above mentioned, said Federal Surety Company of Davenport, Iowa, has ceased to exist as a corporate entity, and its successor, the said E. W. Clark, Receiver of said Federal Surety Company of Davenport, Iowa, is beyond the jurisdiction of this Court

and that unless a Receiver is appointed pendente lite and without notice, all the assets of said Federal Surety Company of Davenport, Iowa, will be removed beyond the jurisdiction of the Courts of the State of Montana and beyond the jurisdiction of this court before service of process can be had upon the defendants, or notice of application for appointment of a Receiver be served and a hearing thereon had.

[fol. 8] 11

That D. A. Crichton of Great Falls, Montana, is a fit and proper person to act as Receiver herein and that he is not a party hereto or interested herein, or an attorney for any party or person interested herein, and is familiar with the assets of the defendant Federal Surety Company of Davenport, Iowa.

Wherefore Plaintiff prays judgment and decree of this Court:

First. Judgment against the defendants for the sum of Two Thousand Seven Hundred Forty-two and 70/100 Dollars ($2,742.70), together with interest thereon at the rate of eight per cent per annum from and after the 22nd day of March, 1932.

Second. That the plaintiff be decreed to have a valid claim against the Federal Surety Company of Davenport, Iowa, in the sum of Two Thousand, Seven Hundred Forty-two and 70/100 Dollars ($2,742.70), with interest thereon at the rate of eight per cent per annum from and after the 22nd day of March, 1932.

Third. That a Receiver be appointed to take possession of, conserve and preserve all of the assets of the Federal Surety Company of Davenport, Iowa, within the State of Montana; and to hold the same until the further order of this Court, and that he be given the usual powers of Receivers appointed by this Court.

Fourth. That D. A. Crichton be appointed such Receiver.

Fifth. That in the event that it is determined that the assets of the Federal Surety Company of Davenport, Iowa, are insufficient to pay all of its creditors in full, that your plaintiff be paid his proportionate share of such assets.

Sixth. For his costs and disbursements herein expended and for such other and further relief as to the Court may seem just.

Molumby, Busha & Greenan, Attorneys for Plaintiff.

(Duly verified.)

[fol. 9] EXHIBIT "A" TO COMPLAINT

The Exhibit "A" annexed to the Complaint was in full substance an automobile liability policy issued by the Federal Surety Company, dated October 25th, 1929, providing for compensation in certain events to the insured, John Mieyr, of Great Falls, and sustaining the allegations of Plaintiff's Complaint, where reference thereto is made to said exhibit.

That Summons duly issued in said cause and service of said Summons was duly made by the Sheriff of Lewis and Clark county, Montana, upon George P. Porter, State Auditor and Commissioner of Insurance of the State of Montana on the 31st day of May, 1932; and return thereof duly made to said Court; that upon the said Complaint being filed, and based exclusively thereon. on the 25th day of March, 1932, the Court made an order appointing D. A. Crichton, of Great Falls, Montana, in the words and figures as follows, to-wit:

ORDER APPOINTING RECEIVER—Filed March 26, 1932

On motion of Molumby, Busha & Greenan, counsel for the Plaintiff, and upon the Summons and positively verified Complaint herein and it appearing to the Court therefrom that there is immediate danger that the property mentioned in said Complaint and all of the property of the Federal Surety Company of Davenport, Iowa, within the State of Montana, will be removed beyond the jurisdiction of this Court, and that the delay resulting from giving Notice of Motion for the appointment of the Receiver in this case would defeat the very right which plaintiff seeks to protect, and imperil the property involved in this action,

It is ordered that Notice of said Motion be dispensed with upon furnishing an undertaking in the sum of Two

Thousand Dollars, and that D. A. Crichton of the City of Great Falls, County of Cascade, State of Montana, be and [fol. 10] he is hereby appointed Receiver of all of the property of the Federal Surety Company within the State of Montana, upon his being sworn to perform his duties faithfully and executing, acknowledging and filing with the Clerk of this Court a bond with sufficient sureties to be approved by the Judge of this Court, *a bond with sufficient surities to be approved by the judge of this court* in the usual form in the sum of Sixty Thousand Dollars to the effect that he, the said Receiver, will faithfully discharge the duties of the Receiver in the action, and obey the Orders of the Court herein.

It is further ordered that the Receiver be vested with all the powers and rights of Receivers appointed by this Court, and with the power to take possession of all property heretofore belonging to the said Federal Surety Company of Davenport, Iowa, and to collect all sums owing to the said Federal Surety Company of Davenport, Iowa, and to keep and preserve the same and manage and disburse the same, according to the further order of this Court.

Done in Open Court this 25th day of March, 1932.

H. H. Ewing, Judge.

That thereafter the said D. A. Crichton took and subscribed an oath, as Receiver, in the words and figures as follows, to-wit:

OATH OF RECEIVER—Filed March 26, 1932

STATE OF MONTANA,
County of Cascade, ss:

I, D. A. Crichton, do solemnly swear that I will faithfully perform, according to law, the duties of Receiver in the above entitled matter.

[fol. 11] D. A. Crichton.

Subscribed and sworn to before me this 26th day of March, 1932. My commission expires December 3, 1934. C. T. Busha, Jr., Notary Public for the State of Mont., Residing at Great Falls, Montana. (Notarial seal.)

That concurrently therewith the said D. A. Crichton made and executed a good and sufficient bond in accordance with said Order appointing him.

On the 31st day of March, 1932, the Defendant E. W. Clark appeared in said action by a Notice of Motion in the words and figures as follows, to-wit:

NOTICE OF MOTION TO DISCHARGE RECEIVERS—Filed Apr. 5, 1932

To John Mieyr, plaintiff above named, and his attorneys, Molumby, Busha & Greenan:

Please take notice that the defendant, E. W. Clark, Receiver and Liquidating Officer of the Federal Surety Company of Davenport, Iowa, appearing specially for the purpose of the Motion, notice of which is hereby given, and for no other purpose, will by the undersigned his attorneys, on the 5th day of April, 1932, at the hour of 10:00 o'clock A. M., or as soon thereafter as a hearing can be had, move the above entitled court in the department in which said action is pending to discharge the Receiver appointed in said action and vacate and set aside the order of appointment upon the ground and for the reason that said Court was without jurisdiction to make such appointment. Said Motion will be based upon the complaint in said action.

Dated this 31st day of March, 1932.

Gunn, Rasch, Hall & Gunn, Attorneys for E. W. [fol. 12] Clark, Receiver and Liquidating Officer of the Federal Surety Company of Davenport, Iowa, appearing specially for the purpose of this motion, notice of which is hereby given, and for no other purpose.

That the said Notice of Motion was served upon the Plaintiff and his attorneys, Molumby, Busha & Greenan, and duly and regularly came on for argument thereafter, on the 5th day of April, 1932, and was by the Court taken under advisement.

Thereafter, on the 24th day of May, 1932, said Motion was denied by an Order of the Court, duly given and made in the words and figures as follows, to-wit:

ORDER DENYING MOTION—Filed May 24, 1932

Defendants' Motion to discharge the Receiver in the above entitled action, and vacate and set aside the Order of his appointment, coming on regularly to be heard, and having been submitted to the Court, and the Court being advised,

It is ordered that said motion be, and the same is hereby, denied.

Dated this 24th day of May, 1932.

H. H. Ewing, Judge.

That on the 24th day of May, 1932, Harry O. Willard, [fol. 13] C. W. Hay, and W. W. Wheaton, as Trustees of the Gordon Campbell-Kevin Syndicate, presented their verified Petition and prayed for leave to levy their Executions upon property of Federal Surety Company within the State of Montana, in the words and figures as follows, to-wit:

PETITION TO LEVY EXECUTION—Filed May 24, 1932

Come now Harry O. Williard, C. W. Hay, and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, a common law trust, and respectfully show the Court:

That on the 20th day of May, 1932, in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, in a case then pending in said Court entitled: Harry O. Williard, C. W. Hay, and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, a common law trust, plaintiffs, vs. Federal Surety Company, a corporation, defendant, said Court duly gave and made its Judgment in said action that said plaintiffs, Harry O. Williard, C. W. Hay, and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, a common law trust, have and recover from said defendant, Federal Surety Company, a corporation, the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of eight per cent per annum from the 2nd day of March, 1926, making a total judgment for principal and interest of Fourteen Thousand Nine Hundred Sixty-eight and 90/100 Dollars ($14,968.90), and

for said plaintiffs' costs and disbursements in said action taxed in the sum of Ten and 50/100 Dollars ($10.50).

That on or about the 24th day of March, 1932, petitioners duly served and filed in the office of the Clerk of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, Petitioners' Costs on appeal in said action entitled Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustee of the Gordon [fol. 14] Campbell Kevin Syndicate, a common law trust, plaintiffs, vs. Federal Surety Company, a corporation, defendant, amounting to the total sum of One Hundred Forty-eight and 40/100 Dollars ($148.40), to which costs bill on appeal said defendant, Federal Surety Company, a corporation, made no objection and the same became final and in effect a judgment against the Federal Surety Company.

That Petitioners have heretofore discovered assets within the State of Montana belonging to the defendant Federal Surety Company, and Petitioners have issued executions out of the said District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, upon its judgments above mentioned, and petitioners desire to levy said executions upon the property of said defendant, Federal Surety Company, and subject such property to the payment of said judgments.

Wherefore petitioners respectfully pray for an Order of this Court permitting Petitioners to levy their executions upon any property within the State of Montana belonging to the defendant Federal Surety Company, a corporation, notwithstanding the Order of the Court heretofore made in this action on or about the 26th day of March, 1932, appointing a Receiver in this action.

Louis P. Donovan, Belden & DeKalb, Attorneys for Petitioners.

(Duly verified.)

That thereupon, on the 24th day of May, 1932, the Court made and entered herein an Order on said verified Petition, after due and regular service of said Petition upon the attorneys for the Plaintiff, in said cause, and attorneys for the Receiver therein, who were present at said hearing, upon

representations of petitioners that they had levied execu- [fol. 15] tion without the knowledge of the Receivership, and wished an order of the Court to purge them of contempt if any was committed, and upon the further representation that in the event of an appeal from the order of May 24, 1932, refusing to vacate the order appointing a receiver, and in the event such order was reversed on appeal, they would have a lien by execution as against any claim to such assets by E. W. Clark, Receiver and Liquidating Officer of the Federal Surety Company of the State of Iowa, and could thus litigate their claim in this state, and with the understanding announced by the Court that no preference over other Montana creditors was given them.

No evidence was submitted other than as contained in the petition for Leave to Levy filed by Petitioners, but it was stated to the Court that the judgment obtained by the Petitioners against Federal Surety Company on the 20th day of May, 1932, was made without knowledge of the receivership proceedings in Iowa; that so far as the local Receiver was concerned, D. A. Crichton, they felt that no jurisdiction had been obtained whereby he could make any claim to the money sought to be levied upon and moreover that he had not, as yet, done so; that the action in making levy was valid and unimpeachable but that in order to save any argument, concerning the matter, it was desired to have the leave of Court requested.

It was further suggested that the said Petitioners claimed and desired to have a lien in any event prior to the assertion of any claim by E. W. Clark, and that, in the event the Order of the Court of May 24th, 1932, refusing to vacate the Order appointing Receiver should be reversed, such would be the result; that so far as local creditors were concerned, Petitioners recognized their right under the decisions to participate in the Montana assets of Federal Surety Company, but subject to any priority gained in the manner recognized by law. It was agreed by counsel for plaintiff and D. A. Crichton, and counsel for said petitioners that there were ample assets in Montana to pay all Montana creditors in full. At [fol. 16] said time counsel for plaintiff stated that he did not consent to the order requested because he did not wish to prejudice D. A. Crichton's rights as Receiver.

Said Order was in the words and figures as follows, to-wit:

ORDER GRANTING PETITION TO LEVY EXECUTION—Filed May 24, 1932

The duly verified petition for Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustee of the Gordon Campbell Kevin Syndicate, a common law trust, being presented to the Court, and Counsel being heard on said petition, and it appearing to the Court that the relief prayed for in said petition should be granted,

Now, therefore, it is ordered that the said petitioners, Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, a common law trust, be and they are hereby granted permission to levy executions issued upon judgments heretofore obtained by said petitioners against the Federal Surety Company, as set forth in their petition herein; and said executions may be levied upon any property of the defendant Federal Surety Company within the State of Montana notwithstanding the Order of this Court made in the above entitled action on or about the 26th day of March, 1932, appointing a Receiver herein.

Done in Open Court this 24th day of May, 1932.

H. H. Ewing, Judge.

That thereafter, on the 25th day of July, 1932, the said Receiver, D. A. Crichton, filed in said cause his Petition for annulment of the said Order, last above set forth, in the words and figures as follows, to-wit:

[fol. 17] NOTICE OF MOTION FOR ANNULMENT OF ORDER—Filed July 25, 1932

To Harry O. Williard, C. W. Hay, and W. W. Wheaton, as trustees of the Gordon Campbell-Kevin Syndicate, a common-law trust, and to Louis P. Donovan and Belden & DeKalb, attorneys:

You and Each of you will please take notice that D. A. Crichton, receiver of the Federal Surety Company of Davenport, Iowa, a corporation, will call on for hearing the petition filed by him for the setting aside the order permitting the levy of executions heretofore made by the above entitled Court on the 24th day of May, 1932; said

hearing to be held in the Court room of the Court House in the City of Great Falls, Cascade County, State of Montana, on the 3rd day of August, 1932.

Molumby, Busha & Greenan, Attorneys for D. A. Crichton, Receiver of the Federal Surety Company of Davenport, Iowa, a Corporation.

That concurrently therewith, the said D. A. Crichton gave notice on said July 25th, 1932, that the same would be brought on for hearing on the 3rd day of August, 1932, all of which were duly served on the attorneys for the said Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, and that thereafter, the said Petition came on regularly for hearing on the 3rd day of August, 1932, and the following proceedings were had, to-wit:

Said Petitioners, Harry O. Williard, W. W. Wheaton and C. W. Hay, appeared by and through their attorneys, Belden & DeKalb, and the Plaintiff by and through his attorneys, Molumby, Busha & Greenan, and E. W. Clark, Defendant, by and through his attorneys, Gunn, Rasch, Hall & Gunn, whereupon counsel for said Williard, Wheaton and Hay resisted the said Motion, last above set forth, and [fol. 18] called to the attention of the Court that there was no ground of Motion stated, and asked to be enlightened as to the ground of Motion, whereupon, it was stated that the ground of Motion was that the Order of May 24th, above set forth, granting the right to said Williard, Wheaton and Hay to levy executions, was void and the said Motion was argued to the Court and submitted for decision;

That on the 3rd day of August, 1932, the Defendant, E. W. Clark, duly served and filed herein his Answer and Cross-Petition in the words and figures as follows, to-wit:

ANSWER AND CROSS-PETITION OF E. W. CLARK, AS RECEIVER AND/OR LIQUIDATING OFFICER OF FEDERAL SURETY COMPANY OF DAVENPORT, IOWA—Filed Aug. 3, 1932

Comes now the defendant, E. W. Clark, as Receiver and/or Liquidating Officer of the Federal Surety Company of Davenport, Iown, and for his answer to the Complaint on file in the above entitled cause:

I

Admits the allegations of paragraphs one and two of said complaint.

II

Admits the allegations of paragraphs three and four of said complaint, except the allegation that the judgment therein referred to was duly given and made and in this connection alleges that prior to the giving and entry of said judgment, to-wit; on September 25th, 1931, the Federal Surety Company of Davenport, Iowa, was dissolved, as alleged in paragraph six of said complaint.

[fol. 19]

III

Admits the allegations of paragraphs five, six and seven of said complaint.

IV

Admits the allegations of paragraphs eight, except that the sum in the hands of the Industrial Accident Commission of Montana is about $19,200.00, and that the money in the custody of the law in the State of Montana is about $8,500.00; also excepting the allegation that the assets in the State of Montana would be dissipated and lost to the creditors if turned over to this defendant as Receiver.

V

Admits the allegations of paragraphs nine, ten and eleven of said complaint.

For a further answer and by way of Cross-petition, E. W. Clark, as receiver of said Federal Surety Company, respectfully shows to this Court and alleges:

That he is the duly appointed, qualified and acting Commissioner of the Insurance Department of the State of Iowa. That, as more fully hereinafter appears, he is the duly appointed, qualified and acting Receiver of the Defendant, Federal Surety Company, of Davenport, Iowa, pursuant to order of the District Court of the State of Iowa, in and for Scott County.

That Federal Surety Company, of Davenport, Iowa, was a corporation organized and existing under and by virtue

of Chapter 404 of the Code of Iowa, 1927, with its principal place of business in the City of Davenport, County of Scott, State of Iowa.

That on the 11th day of September, 1931, the State of Iowa, acting through its Attorney General, John Fletcher, filed in the District Court of the State of Iowa, a court of general jurisdiction, a petition alleging that the assets and funds of the Defendant Company, Federal Surety Company, are reduced and impaired, and that in the interest [fol. 20] of the public a temporary receiver should be appointed for said Company. That on said date, to-wit, the 11th day of September, 1931, an order was entered by said Court appointing E. W. Clark, Commissioner of the Insurance Department of the State of Iowa, as temporary receiver of said Federal Surety Company.

That on the 21st day of September, 1931, the State of Iowa, acting through its Attorney General, John Fletcher, filed in said Court an amendment to said petition, alleging that the assets and funds of the Defendant Company, Federal Surety Company, of Davenport, Iowa, are reduced and impaired by its liabilities, so that most of its capital has been and is dissipated, and that the Commissioner of Insurance of the State of Iowa has advised the Attorney General that the condition of the affairs of the Defendant Company are such that it has no cash on hand with which to pay its losses and claims in the ordinary course of business, and that the further continuance of the business of the Company would not be for the best interest of the public, and alleging further that an order should be entered requiring the Defendant Company to show cause why its business should not be forthwith dissolved and a Receiver appointed to wind up its affairs.

On the same day, to-wit, the 21st day of September, 1931, the said Court entered an order directing Federal Surety Company to show cause on the 25th day of September, 1931, why its business should not be forthwith dissolved and a Receiver appointed to wind up its affairs.

Thereafter, and on the 25th day of September, 1931, and at the time specified for such showing, and after notice to said Federal Surety Company of said order, an order was entered by said Court finding said Federal Surety Company, of Davenport, Iowa, in default for want of appear-

ance pursuant to said order, finding that the assets of said Defendant are in such shape that the Company is unable to meet its current losses and obligations, and that there is grave danger of loss and dissipation of said assets, and that the interest of the public requires that said Defend- [fol. 21] ant, Federal Surety Company, of Davenport, Iowa, be dissolved, its effects distributed, and that a Receiver should be appointed to take charge of and wind up its affairs and further decreeing a dissolution of the Defendant Corporation, and a distribution of its effects. Said order thereupon appointed the undersigned, E. W. Clark, as Receiver for said Defendant, Federal Surety Company, of Davenport, Iowa, and granted to the said Receiver power and authority to do all things necessary to dissolve the business of said corporation and distribute its assets among the creditors thereof all as more fully appears in a certified copy of said decree, hereinafter referred to.

Thereafter, and on the 25th day of September, 1931, the undersigned, qualified as such Receiver by filing his oath, as required by the laws of the State of Iowa, and a bond as prescribed in said Order of appointment, and thereupon the said Court, acting through its Clerk, issued to the undersigned letters of Receivership.

That on the 22nd day of December, 1931, the said Court, in said action in the State of Iowa, made a further order and decree in said cause. That a duly exemplified copy of said decree of said court, made and entered on September 25, 1931, and of said letters of receivership issued to said E. W. Clark, and of said further order and decree of December 22, 1931, are hereto attached, and marked Exhibits "A", "B" and "C", and made a part of this petition.

That all said proceedings were taken pursuant to the laws of the State of Iowa, including Section 8964 of the Codes of Iowa, 1927, which was in effect at the time of said proceedings, and which appears in words and figures as follows:

"The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents or stockholders of any insurance company doing business in the State, to examine into the affairs and condition of [fol. 22] any such company incorporated or doing business therein, or make such examination himself, and the officers or agents thereof shall produce their books for the inspec-

tion of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof, shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company, and a distribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge."

and Chapter 233 of the Acts of the 43rd General Assembly of the State of Iowa, which was in effect at the time of said proceedings, and which appears in words and figures as follows;

[fol. 23] "Section 1. The Commissioner of Insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership.

"Section 2. All expenses of supervision and liquidation shall be fixed by the commissioner of insurance, subject to approval by the court or a judge thereof, and shall upon his order, be paid out of the funds of such company, association or insurance carrier in his hands."

That by virtue of the facts hereinbefore alleged, E. W. Clark is the duly appointed, qualified and acting Receiver and/or Liquidating Officer of the Defendant, Federal Surety Company, of Davenport, Iowa.

That creditors and policyholders of said Federal Surety Company, of Davenport, Iowa, reside in different jurisdictions, including this jurisdiction.

That the assets of said Federal Surety Company are located in different jurisdictions, including this jurisdiction.

That within this jurisdiction this Petitioner is informed and believes that there are assets of said Federal Surety Company, consisting of accounts, notes, claims, securities, furniture, and fixtures, and other personal property, worth the sum of Fifty Thousand Dollars.

That your petitioner is informed and believes that certain creditors are threatening suits against said property, and that attachments have been issued since September 25, 1931, and are about to be issued, or may be issued, against said property, as there are considerable outstanding and past due obligations, and if such suits and attachments are [fol. 24] issued or those now commenced are prosecuted, the creditors of this estate, as well as your petitioner, will sustain an irreparable damage and loss by reason of Court costs, and the damage incident to such interference with the property of the Defendant. That for the orderly administration of this estate, and to avoid preferential treatment of one policy-holder over another, and of one creditor over another, and that all policy-holders and creditors of the Defendant may share alike in the distribution of the assets of said Company, an ancillary receiver should be appointed by this Court.

Wherefore your petitioner prays for an order of this Court confirming the title in him to the assets and property of said Federal Surety Company, and confirming the appointment of D. A. Crichton, as an Ancillary Receiver of all of the property, assets and effects of the above-named

defendant, Federal Surety Company, of Davenport, Iowa, situated within this jurisdiction, to care for and preserve the same until the further order of this Court, and with all rights and powers usually granted to ancillary receivers in such cases, including the right and power to carry into force and effect the order of the original Court or jurisdiction.

Petitioner further prays for an order of this Court directing the agents, employees and all other persons, including creditors, to deliver into the possession of the ancillary receiver, so appointed, and confirmed all the property of the said defendant, Federal Surety Company, and otherwise to comply with the terms of said order; and that the defendants, its agents, servants and attorneys, and all persons, firms and corporations, be restrained and enjoined from in any way interfering with the possession of said property, other than to turn the same over to the said ancillary receiver.

Petitioner states that D. A. Crichton is a proper person to act as Ancillary Receiver by appointment in this Court, and asks that his appointment be confirmed as Ancillary Receiver.

[fol. 25] E. W. Clark, Receiver of Federal Surety Company, by Cook & Balluff, Gunn, Rasch, Hall & Gunn, Attorneys for E. W. Clark, Receiver for Federal Surety Company.

(Duly verified.)

EXHIBIT "A" TO ANSWER AND CROSS-PETITION

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR SCOTT COUNTY

In Equity. No. 28238

STATE OF IOWA EX REL. JOHN FLETCHER, Attorney General, Plaintiff,

vs.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, Defendant

Decree and Order Appointing Receiver

Now, on this 25th day of September, A. D. 1931, being a day of the September 1931 Term of said Court, this mat-

ter comes on for final hearing, upon the appl-cation of the State of Iowa, through its Attorney General, for the appointment of a Receiver for the above named Company, Plaintiff's proofs of service of notice upon the defendant are thereupon submitted and the Court finds that on the 21st day of September, A. D. 1931, this Court entered an Order requiring the defendant to appear on the 25th day of September, A. D. 1931, at two o'clock P. M., and show cause why its affairs and business should not be dissolved and a Receiver appointed to wind up its affairs and to distribute all of its effect as by law provided. The Court further finds that a certified copy of said order was duly [fol. 26] and properly served upon the said defendant as provided in said order.

The Plaintiff, State of Iowa, appears now by its Attorney General, John Fletcher, and Assistant Attorney General, Carl J. Stephens, and the defendant appears not, and its default is hereby entered against it.

Trial is thereupon had to the Court, and the Court having examined the evidence submitted by plaintiff, and being fully advised in the premises, finds:

That the said Federal Surety Company is a corporation organized and existing under Chapter 404 of the Insurance Laws of the State of Iowa.

The Court further finds that the assets of the said defendant are in such shape that said Company is unable to meet its current losses and obligations, and that there is grave danger of the loss and dissipation of said assets, and that the interest of the public requires that said Defendant, Federal Surety Company, be dissolved, its effects distributed, and that a Receiver be appointed to take charge of and wind up its affairs.

Wherefore it is finally ordered, adjudged and decreed:

(1) That under and in accordance with the provisions of Section 8964 of the Code of 1927 of the State of Iowa the defendant, Federal Surety Company, shall be dissolved and its effects distributed.

(2) That E. W. Clark, Commissioner of Insurance of the State of Iowa, be and he is hereby appointed permanent Receiver of said defendant company in accordance with the provisions of Chaper 233, Acts of the Forty-third General Assembly of the State of Iowa, with authority and

direction to take charge of and manage the property, assets and business of the defendant, with full power to sue for, collect, receive and take into his possession the goods, chattels, rights, credits, monies, books, papers, property and assets of every description and wheresoever situated, of the defendant, and to do any and all acts and things which may be necessary, proper or advisable to preserve the prop-
[fol. 27] erty, assets, rights and privileges of the defendant, and with all the incidental powers ordinarily vested in receivers in like cases, and that the Union Savings Bank and Trust Company, of Davenport, Iowa, is hereby designated as the depository of all money and funds coming into the hands of the Receiver.

(3) That said Receiver shall, as soon as it may be practicable, file an inventory of all property of every description which shall have come into his possession as such Receiver.

(4) That said Receiver proceed to wind up the business of the defendant, and to that end all creditors, including all lien and unsecured creditors of the defendant, and all claimants to specific properties in the hands of the Receiver, be and they hereby are ordered to file proof of their claims with the Receiver on or before the first day of April, 1932. Every proof of claim shall be itemized and sworn to and shall state with particularity the nature and the origin of the claim so asserted, the actual consideration therefor when the same has become or will become due, whether any and what securities are held, whether any and what payments have been made thereon, that the sum claimed is justly due defendant, and that the claimant has not, nor has any other person for his use, received any security or satisfaction whatever other than by him set forth.

(5) That said Receiver shall within ninety (90) days from this date give a notice to creditors of the defendant advising them with respect to filing of claims, the powers of the Receiver with respect thereto, as herein set forth, and the time within which all claims shall be filed by United States Mail, addressed to the last known address of all creditors as shown by the books of the Company, and in addition thereto the Receiver shall cause a similar notice to be published in at least one (1) newspaper of general circulation in the City of Davenport, Iowa, once each week

for two (2) consecutive weeks, the last publication thereof to be not later than the 31st day of October, 1931.

[fol. 28] (6) That the said Receiver is authorized to examine the claims so filed, as heretofore provided, and to make his findings thereon, allowing or disallowing, in whole or in part, each and all of said claims, and to file in this cause, as soon as possible after the time for filing claims has expired, a written report setting forth for the confirmation of this Court the results of such findings, subject to the right of any claimants to object to any findings so made, such objection to be filed in writing in this cause at such time as the Court may hereafter prescribe.

(7) In the event that any creditor or creditors shall not so present or file their claims with the Receiver aforesaid on or before the first day of April, 1932, it is hereby ordered that they shall be debarred from participating in any dividend or distribution that may hereafter be made in these proceedings, or from any interest in and to the properties of the defendant, Federal Surety Company, administered by the Receiver, or any proceeds derived from the sale or other disposition thereof.

(8) That the Receiver is authorized and directed that in the event it approves any priorities or liens upon any of the properties administered by him, he have such properties appraised by two (2) competent appraisers whom he shall select, who shall report to this Court not less than five (5) days preceding the date fixed for the sale of the properties of the defendant company, as hereafter set out, their findings with respect to the values of the properties subject to such priorities or liens.

(9) That the Receiver shall, in addition to the appraisement of the properties, provided for in No. 8 thereof cause all of the assets and property of the defendant, except cash money, to be appraised by two (2) competent appraisers whom the Receiver shall select, who shall report to this Court not less than five (5) days preceding the date fixed for the sale of the properties of defendant company, as hereafter set out, their findings with respect to the value of the property and assets appraised by them.

[fol. 29] (10) That the Receiver is further authorized and directed to sell all the property and assets, except money,

whether real, personal or mixed, tangible or intangible, of the defendant, Federal Surety Company, at Receiver's sale, free and clear of all liens and incumbrances, but subject, however, to the expenses of the receivership, allocated between the different lots or parcels in accordance with the appraised value thereof. Such sale shall be at public auction for cash to the highest bidder and shall be made as an entirety or in such lots or parcels as the Receiver may determine upon and the Court approve, and as will protect any liens or priorities, reserving to the holder of any such liens or priorities the right to bid in any of the property so sold, and, for the purpose of making settlement or payment thereof, to use and apply his securities in order that there may be credited thereon the sum or sums apportionable and applicable thereto out of the net proceeds of such sale.

(11) That the Receiver shall give notice of such sale by publishing a notice thereof in at least two (2) newspapers of general circulation in Scott County, Iowa, once each week for four (4) consecutive weeks, the last publication thereof being at least ten (10) days before the date fixed for such sale.

(12) That no sale by the Receiver of the properties of defendant company shall be valid until the Receiver shall make report thereof and file such report with the Clerk of this Court and present such report for approval and confirmation to some Judge of this Court.

(13) That the Receiver is hereby authorized to employ such counsel as he shall deem necessary to advise him in the performance of his official duties, and that he shall have leave to employ such agents and employees as may be necessary to enable him properly to perform his duties, including the employment of auditors for the purpose of an examination of the books and records of the defendant company and making an itemized and detailed report thereof to [fol. 30] the Receiver.

(14) That the said E. W. Clark shall, before entering upon his duties herein, take an oath and file a bond in this Court as Receiver, which bond shall be in the sum of One Hundred Thousand ($100,000.00) Dollars, with sureties to be approved by the Clerk of this Court, conditioned that the

said Receiver shall well and truly perform the duties of his office; whereupon, letters of receivership shall issue to him.

(15) That the aforesaid E. W. Clark was heretofore appointed temporary Receiver of Federal Surety Company in this action. It is ordered that said E. W. Clark shall with all reasonable speed file this report as temporary Receiver with this Court, and upon approval thereof he shall stand discharged as temporary Receiver.

(16) Said Receiver or any other party in interest is hereby given leave to apply to the Court at any time for any other or further directions, orders or decrees as may be necessary or proper, and the Court retains jurisdiction of this cause for this purpose.

(Sgd.) W. R. Maines, Judge.

EXHIBIT "B" TO ANSWER AND CROSS-PETITION

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR SCOTT COUNTY

In Equity. No. 28238

STATE OF IOWA ex Rel. JOHN FLETCHER, Attorney General, Plaintiff,

vs.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, Defendant

Order as to Suits and Contracts to Which Federal Surety Company Was or Is Alleged to be a Party

[fol. 31] Be it remembered that on this 22nd day of December, 1931, there came on for hearing before the Court the application of the Receiver appointed by this Court in the above entitled cause for instructions and orders concerning his duty as to contracts, including insurance policies and surety bonds, to which Federal Surety Company was a party, and as to suits in which Federal Surety Company is named as defendant, some of which were pending September 25, 1931, and some of which purport to have been commenced thereafter, and some in which state officers

purport to hold property of Federal Surety Company pursuant to levies of writs of attachment.

The Court, having considered the same, and being fully advised in the premises, now finds, determines and adjudges:

That Federal Surety Company was incorporated and existed as a corporation under and by virtue of the laws of the State of Iowa.

That this action was commenced by the State of Iowa, acting through its Attorney General, and the Order and Decree of this Court was entered herein September 25, 1931, all pursuant to Section 8402 of the Code of Iowa of 1927 and of 1931, being Section 1640 of the Code of Iowa of 1897, which provides as follows:

"Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the State of Iowa. An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them."

and Section 8964 of the Code of Iowa of 1927 and of the Code of 1931, being Section 1731 of the Code of 1897, which provides — follows:

"The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents, or stockholders of any insurance company doing business in [fol. 32] the state, to examine into the affairs and condition of any such company incorporated or doing business therein or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more

than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney-general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor. The application of the attorney-general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge."

and Section 8613-c1 of the Code of Iowa of 1931, being Chap-
[fol. 33] ter 233 of the Acts of the 43rd General Assembly of Iowa, which provides as follows:

"The commissioner of insurance henceforth shall be the receiver and or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership."

That this Court, as a court of equity, constituted by Sections 5 and 6 of the Constitution of the State of Iowa, which provides as follows:

"The District Court shall consist of a single Judge, who shall be elected by the qualified electors of the District in which he resides. The Judge of the District Court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of Judge of the Supreme Court, during the term for which he was elected."

"The District Court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have

jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law."

and by Section 10761 of the Code of Iowa of 1931, which provides as follows:

"The district court shall have general, original, and exclusive jurisdiction of all actions, proceedings, and remedies, both civil and criminal, except in cases where exclusive or concurrent jurisdiction is or may hereafter be conferred upon some other court or tribunal by the constitution and laws of the state, and shall have and exercise all the powers usually possessed and exercised by courts of record."

on September 25, 1931, had and now has jurisdiction of [fol. 34] this action and the subject matter thereof.

That pursuant to the power conferred by said sections, pursuant to the allegations set forth in the petition filed herein, as amended, and pursuant to good cause shown herein, as in said sections provided, this Court did, on September 25, 1931, enter an Order and Decree in this cause, and thereby dissolved Federal Surety Company and terminated its corporate existence, and thereby appointed E. W. Clark, who was and is Commissioner of Insurance of the State of Iowa, as the Receiver and/or liquidating officer, to take title to all property of the dissolved corporation for the purpose of liquidating its affairs and distributing its assets, as by law provided.

That by virtue of the statutes hereinbefore referred to, as construed by the Court of last resort in the State of Iowa, and by virtue of the proceedings in this cause, the said corporation, Federal Surety Company, ceased to exist upon the entry of the Order and Decree herein at 4:30 P. M., Central Standard Time, September 25, 1931, and that thereupon all its agencies ended, its employees, including attorneys, were discharged, and it was put, without exception or notice of appeal, beyond all further corporate activity, its existence was put to an end for all purposes whatsoever, so that it can neither make nor take contracts, nor sue or be sued, and so that all debts to or from it became extinguished and all actions by or against it abated,

and so that as after death of a natural person, it can have no interest in the property theretofore by it controlled.

That in any action pending wherein Federal Surety Company is named as a defendant, Federal Surety Company is not now, and since September 25, 1931, has not been a party defendant, so that a judgment rendered therein is or will, upon rendition, be a nullity, not binding upon the Receiver appointed herein. That a lien on property owned September 25, 1931, by Federal Surety Company, asserted by virtue of the levy of a writ of attachment in such a cause, cannot be perfected without the entry [fol. 35] of a final judgment in such cause against Federal Surety Company; that there can be no judgment or execution against Federal Surety Company, or property owned by it September 25, 1931; and that claimants so asserting liens are, and since September 25, 1931, have been without remedy for the enforcement thereof.

It is, therefore, ordered, adjudged, and decreed:

(1) That the defendant, Federal Surety Company, is, and since September 25, 1931, has been dissolved, and that its corporate existence is terminated, with the results hereinbefore determined.

(2) That E. W. Clark, receiver and/or liquidating officer of Federal Surety Company, is the successor to said corporation and as such holds title to all property owned by Federal Surety Company at the time it so ceased to exist.

(3) That E. W. Clark, receiver and/or liquidating officer, be and he is hereby directed to refrain from entering a general appearance on behalf of Federal Surety Company to conduct a defense on the merits in any action wherein Federal Surety Company is named as a defendant.

(4) That E. W. Clark, receiver and/or liquidating officer, be and he is hereby given leave in his discretion to appear specially, or as may be necessary, in any action wherein Federal Surety Company is named as defendant, for the purpose of presenting a plea in abatement, motion to dismiss, or motion to quash or dissolve any summons or writ of attachment, and any levy attempted thereunder, and/or other writ, process, garnishment or seizure of property.

(5) That a person asserting a claim against Federal Surety Company shall share in the assets distributed by

the Receiver only to the extent that his claim is allowed by this Court, either upon recommendation to the Court or after proof, and that in passing upon and determining the validity of claims presented, judgments purporting to have been rendered against Federal Surety Company after September 25, 1931, be disregarded, and that a lien asserted by virtue of attachment or other process in any [fol. 36] cause wherein judgment was not rendered prior to September 25, 1931, be disregarded in determining the rights of the claimant asserting the same.

(6) That all policies of insurance, contracts of reinsurance, and surety bonds in effect September 25, 1931, including the policies of insurance and surety bonds wherein Federal Surety Company appeared as principal, surety, insurer, insured, reinsurer or reinsured, were cancelled and terminated upon entry in this cause of the order of dissolution of Federal Surety Company at 4:30 P. M., Central Standard Time, September 25, 1931.

W. R. Maines, Judge.

EXHIBIT "C" TO ANSWER AND CROSS-PETITION

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR SCOTT COUNTY

Equity. No. 28238

STATE OF IOWA ex Rel. JOHN FLETCHER, Attorney General, Plaintiff,

vs.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, Defendant

Letters of Receivership Issued to E. W. Clark, of Des Moines, Iowa

STATE OF IOWA,
Scott County, ss:

To all to whom these presents shall come, Greeting:

Whereas, on the 25th day of September, A. D. 1931, the District Court of Iowa for Scott County, in a certain cause then pending and numbered 28238 and entitled State of

Iowa, ex rel. John Fletcher, Attorney General, Plaintiff, vs. Federal Surety Company of Davenport, Iowa, Defendant, did on application of the plaintiff in said suit enter [fol. 37] an Order appointing E. W. Clark of Des Moines, Iowa, as Receiver; and

Whereas, said E. W. Clark of Des Moines, Iowa, has entered into bond for the faithful performance of his duty and has filed the oath prescribed by law.

Now, therefore, know ye and all whom it may concern that said E. W. Clark of Des Moines, Iowa, has been appointed Receiver in the above entitled action with full power to demand, sue for and take possession of all money and property belonging to the defendant, Federal Surety Company, and in general to do all other acts which may be required of said Receiver by law or the Order of the Court.

In testimony whereof I have hereunto set my hand and affixed the seal of the District Court of said County at Davenport, this 25th day of September, A. D. 1931.

Emil F. Schroder, Clerk of the District Court, by Olive S. Clements, Deputy. (Seal.)

Certificate of Judge and Clerk

In the District Court of Iowa in and for Scott County, State of Iowa

Scott County, ss:

I, Emil F. Schroder, Clerk of the District Court of the State of Iowa, in and for said County, do hereby certify that the foregoing is a true, compared and perfect transcript of the following described instruments in the matter of State of Iowa, Ex Rel. John Fletcher, Attorney General, Plaintiff vs. Federal Surety Company of Davenport, Iowa, Defendant, being Equity cause No. 28238 of the causes pending in my office, all of which instruments were filed in my office on the several dates noted below, to-wit:

(1) Decree and Order dissolving Federal Surety Company of Davenport, Iowa, and appointing E. W. Clark per- [fol. 38] manent receiver, entered September 25, 1931;

(2) Letters of Receivership issued September 25, 1931, to E. W. Clark;

(3) Order as to suits and contracts to which Federal Surety Company was or is alleged to be a party, entered December 22, 1931.

I further certify that on the date of this certificate the said E. W. Clark is the duly appointed, qualified and acting Receiver of Federal Surety Company.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at my office in Davenport in said County this 8 day of June, 1932.

Emil F. Schroder, Clerk of the District Court of the State of Iowa in and for Scott County. (Seal.)

STATE OF IOWA,
Scott County, ss:

I, W. R. Manies, one of the Judges of the District Court of the State of Iowa, in and for the Seventh Judicial District of said State, composed of the Counties of Scott, Clinton, Muscatine and Jackson, do hereby certify that Emil F. Schroder, who has given the preceding certificate, was, at the time of so doing, the Clerk of the District Court of the state of Iowa, in and for Scott County, in said District, duly qualified as such, that he is the proper custodian of the records of said Court, and the proper officer to give such certificate, and that the same is in due form of law.

Witness my hand at Davenport, Iowa, this 8 day of June, A. D. 1932.

W. R. Maines, Judge District Court, Seventh Judicial District.

STATE OF IOWA,
Scott County, ss:

I, Emil F. Schroder, Clerk of the District Court of the State of Iowa, in and for said County, do hereby certify that the Honorable W. R. Maines, who has given the pre-
[fol. 39] ceding certificate, was, at the time of so doing, one of the Judges of the District Court of the Seventh Judicial District of the State of Iowa, duly commissioned and sworn, to all whose acts as such, full faith and credit are and ought to be given.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Davenport, in said County, this 8th day of June, A. D. 1932.

Emil F. Schroder, Clerk District Court. (Seal.)

That on the 3rd day of August, 1932, the Plaintiff filed herein his admission of the allegations of the Answer and Cross-Petition of E. W. Clark, in the words and figures as follows, to-wit:

ADMISSION OF ALLEGATIONS IN ANSWER AND CROSS-PETITION—Filed Aug. 3, 1932

Comes now the plaintiff in the above entitled action, and through his counsel of record admits each and every affirmative allegation, fact and thing contained in the Answer and Cross Petition of E. W. Clark, as Receiver and/or Liquidating Officer of Federal Surety Company of Davenport, Iowa, and joins in the prayer of said petition, and consents to the granting of the same.

Molumby, Busha & Greenan, Attorneys for the Plaintiff.

That thereafter, on the 25th day of August, 1932, out of the presence of said Williard, Wheaton and Hay, and of their attorneys, and without their knowledge, the Court made and entered an Order Confirming the Appointment of Receiver in the words and figures as follows, to-wit:

[fol. 40] ORDER CONFIRMING APPOINTMENT OF RECEIVER AND DECREE—Filed Aug. 25, 1932

Be it remembered that on the 2nd day of Aug., 1932, the above entitled matter came on for hearing before the Court, upon the plaintiff's Petition and the answer and Cross-Petition of E. W. Clark as Receiver and/or Liquidating Officer of Federal Surety Company, asking for confirmation of his title to certain assets and for confirmation of the appointment of D. A. Crichton as Receiver herein and a determination of the relative rights and powers of the said Clark and the said Crichton; E. W. Clark, Receiver and/or Liquidating Officer, appearing by Cook & Balluff,

and Gunn, Rasch, Hall & Gunn, his attorneys, and the Plaintiff and D. A. Crichton appearing in person and by their attorneys, Molumby, Busha & Greenan.

The Court, being fully advised in the premises, finds:

That Federal Surety Company was organized and existed as a corporation under and by virtue of the laws of the State of Iowa relating to insurance companies. That pursuant to the statutes of the State of Iowa an action in equity was commenced by the Attorney General of the State of Iowa as plaintiff and against Federal Surety Company as defendant. That in that action, and after notice to Federal Surety Company, an order and decree of said Court was entered on September 25, 1931, dissolving Federal Surety Company and appointing E. W. Clark, Commissioner of the Department of Insurance of the State of Iowa, as Receiver and/or liquidating Officer of the dissolved Federal Surety Company and directing him as such to liquidate the assets of said Federal Surety Company and to distribute the same among the creditors of Federal Surety Company whose claims are determined as in said order provided. That the said Clark qualified and is now the duly appointed, qualified and acting Receiver and/or liquidating officer of the dissolved corporation, Federal Surety Company.

That thereupon the corporate existence of Federal [fol. 41] Surety Company terminated and title to all property theretofore owned by it passed to the Commissioner of the Department of Insurance of the State of Iowa in his capacity as Receiver and/or liquidating officer as aforesaid.

That the assets owned by the former Federal Surety Company, wherever situated, should be liquidated and distributed ratably to all persons having claims against Federal Surety Company, subject to any liens and rights of creditors acquired on or prior to September 25, 1931, in or to specific property.

That this Court has and should assert jurisdiction of all property owned by Federal Surety Company, title to which passed to E. W. Clark, Receiver and/or liquidating officer as aforesaid, and situated in the State of Montana for the purposes, among other things of (1) determining the extent of liens or other rights acquired in or to such property prior to the dissolution of Federal Surety Company as aforesaid; (2) assuring to residents of Montana a distribution out of the assets owned by Federal Surety Company ratably with

all creditors of Federal Surety Company wherever situated; (3) assisting said Receiver and/or Liquidating officer with and facilitating the liquidation of assets owned by Federal Surety Company under orders of the Iowa Court. It is, therefore, determined, ordered, adjudged and decreed as follows:

(1) The appointment and qualification of D. A. Crichton as Receiver of the rights, claims and property owned by Federal Surety Company on September 25, 1931, and now owned by Clark, Receiver, as aforesaid, and situated in the State of Montana, be and it is hereby confirmed, and that as such Receiver he proceed with the liquidation of such assets and with the determination of claims all as provided in this decree.

(2) All persons, firms and corporations domiciled or resident within the State of Montana asserting claims against Federal Surety Company including those claiming liens or other rights in or to specific property, are ordered to file proof of their claims with the Clerk of this Court on or [fol. 42] before the 18th day of December, 1932. Every proof of claim so filed shall be itemized and sworn to, and shall state with particularity the nature and origin of the claim so asserted, the actual consideration therefor, when the same has become or will become due, whether any and what security is held therefor, whether any and what payments have been made thereon, whether Federal Surety Company was indebted for the amount claimed as surety or principal, that the sum claimed is justly due from said Federal Surety Company, and that the claimant has not, nor has any person for the claimant's use, received any security or satisfaction on account of said claim, except as therein set forth.

(3) The Receiver shall forthwith cause to be published in a newspaper of general circulation in the City of Great Falls, Montana, once each week, for three (3) consecutive weeks, a notice to all persons, firms or corporations resident in the State of Montana having claims against Federal Surety Company, advising them with respect to filing of claims, the powers of the Receiver with respect thereto, as herein provided, and the time as herein provided within which all claims shall be filed.

(4) Said Receiver is authorized to examine the claims so filed and to make findings thereon, allowing or disallowing, in whole or in part, each and all of said claims, and to file in this cause, as soon as possible after the time for filing claims has expired, a written report setting forth, for the confirmation of this Court, the results of such findings, subject to the rights of E. W. Clark, Receiver and/or liquidating officer, as aforesaid, or of any claimant or claimants, to object to any finding so made, such objection to be filed in writing in this cause at such time as the Court may hereafter prescribe.

(5) In the event that any creditor or creditors, or claimant or claimants shall not so present or file their claims on or before the 1st day of December, 1932, it is hereby ordered that they and each of them shall be debarred from participating in any dividend or distribution that may be [fol. 43] made in these proceedings, or from any interest in and to the properties administered by the Receiver, or any proceeds derived from a sale or other disposition thereof.

(6) That D. A. Crichton, Receiver, as aforesaid, take possession of and conserve, manage and dispose of, as in this decree provided, all real estate and tangible personal property situated within the State of Montana, title to which was held by Federal Surety Company September 25, 1931, and has passed to E. W. Clark, Receiver and/or liquidating officer, as aforesaid. That the rentals, profits and proceeds of property so held, managed and disposed of be held and disbursed by the said D. A. Crichton, Receiver, as hereinafter provided.

(7) That D. A. Crichton, Receiver as aforesaid, be and he is hereby directed to assist and cooperate with E. W. Clark, Receiver and/or liquidating officer as aforesaid, in the collection, sale or other disposal of all claims of Federal Surety Company collectible in Montana, whether upon open account, promissory note, or otherwise, and whether unsecured or secured by lien on property situated in Montana; to join E. W. Clark, Receiver and/or liquidating officer as aforesaid, in the execution and delivery of any release, receipt or satisfaction essential to or which will facilitate the collection, sale or other disposal of any such claim determined upon by the said Clark, Receiver and liquidating officer as aforesaid.

(8) If and when claims allowed by Order of this Court, either upon recommendation of the Receiver or after hearing, are allowed by Order of the District Court of the State of Iowa, in and for Scott County, as claims entitled to share in the assets coming into the hands of the liquidating officer along with other claims of similar rank, D. A. Crichton, Receiver as aforesaid, shall forthwith transfer and remit to E. W. Clark, Receiver and/or Liquidating officer as aforesaid, all money and property in his hands as such Receiver, except so much thereof as has been determined by Order [fol. 44] of this Court to be subject to specific liens or rights, and except so much thereof as may be necessary to pay and discharge costs of administration in this proceeding, including the compensation of D. A. Crichton, Receiver and of his attorneys.

(9) In the event that claims allowed and determined in this proceeding are not allowed and determined in such manner as to permit those claimants to share ratably with all other creditors of Federal Surety Company in the assets distributed by E. W. Clark, Receiver and/or liquidating officer as aforesaid, all money and property coming into the hands of D. A. Crichton, Receiver, shall be retained by him for distribution to creditors whose claims are determined in this proceeding, such distribution to be in accordance with orders of this Court to be entered upon application then made by the said D. A. Crichton, Receiver, at that time.

(10) E. W. Clark, Receiver and/or liquidating officer, is hereby given leave to intervene at any time in this proceeding as a party in interest, to take such exceptions, make such objections and prosecute the same as would any other party in interest in this proceeding.

(11) D. A. Crichton, Receiver as aforesaid, and any other party in interest in this proceeding, are hereby given leave to apply to this Court at any time for further directions, Orders, or Decree, not inconsistent with this Decree, as may be necessary or proper and the Court retains jurisdiction of this cause to that end.

(12) It is further ordered, adjudged and decreed that the agents, attorneys, employees, and all other persons in the employ of Federal Surety Company, and all other persons, including creditors of said Company, are hereby re-

quired and commanded forthwith to deliver all property and assets of every nature belonging to said Federal Surety Company and situated in the State of Montana to the said D. A. Crichton, Receiver, as aforesaid, and/or the said E. W. Clark, Receiver and/or liquidating officer as aforesaid; and that the Industrial Accident Board of the State [fol. 45] of Montana and the Clerk of the District Court of Lewis and Clark County, Montana, are hereby respectively ordered and directed to deliver all assets, bonds or money of the Federal Surety Company in their possession or control, or in the possession or control of either of them, to said D. A. Crichton, Receiver, as aforesaid, and/or the said E. W. Clark, Receiver, and/or liquidating officer, as aforesaid; and it is further ordered that the order of this court heretofore made on May 24th, 1932, in this case, granting permission to Harry O. Williard, C. W. Hay, and W. W. Wheaton, as trustees of the Gordon-Campbell Kevin Syndicate, to levy executions issued upon judgments heretofore obtained by them against the Federal Surety Company be and the same is hereby revoked, annulled and set aside.

It is further ordered, adjudged, and decreed that all former agents, attorneys and employees of said Federal Surety Company, and all creditors of the Federal Surety Company, and generally all persons, firms and corporations whatsoever are hereby enjoined from interfering with the possession and control by the said Receivers of the property, assets and effects of said Federal Surety Company hereinbefore in this decree referred to.

H. H. Ewing, Judge.

That said Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees, as aforesaid, were given notice thereafter of the entry of said Order Confirming Appointment of Receiver and, thereafter, on the 31st day of August, 1932, said Williard, Wheaton and Hay, as Trustees, as aforesaid, served upon all counsel for Plaintiff and Defendant, Clark, their Motion, in the words and figures as follows, to-wit:

MOTION TO VACATE ORDER AND DECREE—Filed Aug. 31, 1932

Come now Harry O. Williard, W. W. Wheaton, and C. W. [fol. 46] Hay, as Trustees of Gordon Campbell Kevin

Syndicate, a common law trust, judgment creditors of Federal Surety Company of Davenport, Iowa, having an execution lien upon certain property of the said Federal Surety Company of Davenport, Iowa, situated within the State of Montana, and move this Honorable Court to vacate and annul the order and decree herein given and made on the 25th day of August, 1932, entitled "Order Confirming Appointment of Receiver," upon the following grounds and for the following reasons, to-wit:

(1) That the facts alleged in the Complaint and Cross-Complaint in said action are not sufficient to justify the appointment of a Receiver of the property of Federal Surety Company of Davenport, Iowa.

(2) That the court was without jurisdiction to appoint a Receiver in said action.

(3) That said Order, insofar as it directs the said Receiver to collect the property of Federal Surety Company of Davenport, Iowa, and particularly that portion thereof heretofore levied upon under Execution issued out of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, in the case entitled "Harry O. Williard, and others, plaintiffs, vs. Federal Surety Company, defendant," and to transmit the same out of the jurisdiction of the State of Montana without first paying the Montana creditors of said Federal Surety Company of Davenport, Iowa, is illegal, erroneous and contrary to the public policy of the State of Montana.

This motion will be based upon the records and files in this action, and upon the Affidavit of Harry O. Williard herewith served and filed.

As a separate and distinct Motion, the said Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell Kevin Syndicate, a common law trust, judgment creditors of Federal Surety Company of Davenport, Iowa, situated within the State of Montana, respectfully move the Court that the said order confirming ap-
[fol. 47] pointment of Receiver made and entered in this action on the 25th day of August, 1932, be modified as follows, to-wit:

(1) By striking from said Order lines 7 to 27 inclusive of page 2 thereof, reading as follows:

"That thereupon the corporate existence of Federal Surety Company terminated, and title to all property heretofore owned by it passed to the Commissioner of the Department of Insurance of the State of Iowa in his capacity as Receiver and/or liquidating officer as aforesaid.

"That the assets owned by the former Federal Surety Company, wherever situated, should be liquidated and distributed ratably to all persons having claims against Federal Surety Company, subject to any liens and rights of creditors acquired on or prior to September 25, 1931, in or to specific property.

"That this Court has and should assert jurisdiction of all property owned by Federal Surety Company, title to which passed to E. W. Clark, Receiver and/or liquidating officer as aforesaid and situated in the State of Montana for the purposes, among other things of (1) determining the extent of liens or other rights acquired in or to such property prior to the dissolution of Federal Surety Company as aforesaid; (2) assuring to residents of Montana a distribution out of the assets owned by Federal Surety Company wherever situated; (3) assisting said Receiver and/or liquidating officer with and facilitating the liquidation of assets owned by Federal Surety Company under orders of the Iowa court. It is therefore, determined, ordered, adjudged and decreed as follows:"

(2) By striking from said Order Paragraph (6) appearing on Page 4 thereof, reading as follows:

"That D. A. Crichton, Receiver as aforesaid, take possession of and conserve, manage and dispose of, as in this decree provided, all real estate and tangible personal property situated within the State of Montana, title to which was [fol. 48] held by Federal Surety Company September 25, 1931, and has passed to E. W. Clark, Receiver and/or liquidating officer, as aforesaid. That the rentals, profits and proceeds of property so held, managed and disposed of be held and disbursed by the said D. A. Crichton, Receiver, as hereinafter provided."

And insert in lieu thereof the following:

"That the said D. A. Crichton, Receiver as aforesaid, take possession of and conserve and manage and dispose of as in this decree provided all real estate and tangible per-

sonal property situated within the State of Montana, title to which was held by Federal Surety Company on the 25th day of August, 1932, excepting, however, any of such property previously seized under Writs of Execution or Attachment duly issued out of any of the Courts of this State."

(3) By striking all of paragraphs (8) and (9) of said Order appearing on pages 4 and 5 thereof, and reading as follows:

"(8) If and when claims allowed by Order of this Court either upon recommendation of the Receiver or after hearing, are allowed by Order of the District Court of the State of Iowa, in and for Scott County, as claims entitled to share in the assets coming into the hands of the liquidating officer along with other claims of similar rank, D. A. Crichton, Receiver as aforesaid, shall forthwith transfer and remit to E. W. Clark, Receiver and or Liquidating officer as aforesaid, all money and property in his hands as such receiver, except so much thereof as has been determined by Order of this Court to be subject to specific liens or rights, and except so much thereof as may be necessary to pay and discharge costs of administration in this proceeding, including the Compensation of D. A. Crichton, Receiver and of his Attorneys.

"(9) In the event that claims allowed and determined in this proceeding are not allowed and determined in such manner as to permit those claimants to share ratably with all other creditors of Federal Surety Company in the assets [fol. 49] distributed by E. W. Clark, Receiver and or Liquidating Officer as aforesaid, all money and property coming into the hands of D. A. Crichton, Receiver, shall be retained by him for distribution to creditors whose claims are determined in this proceeding, such distribution to be in accordance with orders of this Court to be entered upon application then made by the said D. A. Crichton, Receiver, at that time."

(4) By striking from pages 5 and 6 thereof, the following portion of paragraph (12) thereof:

"and/or the said E. W. Clark, Receiver and/or liquidating officer as aforesaid; and that the Industrial Accident Board of the State of Montana and the Clerk of the District Court

of Lewis and Clark County, Montana, are hereby respectively ordered and directed to deliver all assets, bonds or money of the Federal Surety Company in their possession or control, or in the possession or control of either of them, to said D. A. Crichton, Receiver, as aforesaid, and/or the said E. W. Clark, Receiver, and/or liquidating officer, as aforesaid,"

and inserting in lieu thereof a direction to the Receiver to pay the claims of Montana creditors in full before remitting any portion of said assets to the Iowa receiver.

(5) By striking from paragraph (12) on page 6 of said Order, the following portion thereof:

"and it is further ordered that the order of this court heretofore made on May 24th, 1932, in this case, granting permission to Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustees of the Gordon Campbell Kevin Syndicate, to levy executions issued upon judgments heretofore obtained by them against the Federal Surety Company be and the same is hereby revoked, annulled and set aside,"

and insert in lieu thereof a direction to the Receiver to recognize the validity of levies made under Execution issued [fol. 50] upon judgment obtained by these moving parties.

This motion is made and renewed separately as to each of the paragraphs above mentioned, and is based upon the following grounds:

(1) That the original Order appointing the Receiver in this action made and entered on the 26th day of March, 1932, was null and void and did not have the effect of drawing into the custody of this Court the property of Federal Surety Company of Davenport, Iowa, in the possession of the Industrial Accident Board of the State of Montana, or the moneys in the possession of the Clerk of the District Court of the First Judicial District of the State of Montana;

(2) That at the time the order confirming the appointment of Receiver was made herein on the 25th day of August, 1932, these moving parties had a good and valid execution lien upon said property of Federal Surety Company of Davenport, Iowa, in the custody of the Industrial Accident Board and in the custody of the Clerk of the Dis-

trict Court of the First Judicial District of the State of Montana;

(3) That under the law of this state the defendant, Federal Surety Company of Davenport, Iowa, was continued in existence for the purpose of being sued so long as any policy or liability remained outstanding against it in this state;

(4) That under the law of this state, Montana creditors of Federal Surety Company of Davenport, Iowa, are entitled to be paid in full the amount of their claims against said Federal Surety Company out of assets of said Federal Surety Company of Davenport, Iowa, situated within the State of Montana before any portion thereof is remitted to the foreign Receiver;

(5) That by virtue of the levy of Execution made under Writs issued upon the Judgment obtained by these moving parties the property levied upon was drawn into the custody and control of the District Court of the Tenth Judicial District of the State of Montana, and the District Court of [fol. 51] the Eighth Judicial District of the State of Montana had no jurisdiction to interfere with such custody and control of the District Court of Fergus County by entry of its order made on August 25, 1932.

This motion will be based upon the records and files in this action and upon the Affidavit of Harry O. Williard hereto attached.

Louis P. Donovan, Belden & DeKalb, Attorneys for Harry O. Williard, W. W. Wheaton, C. W. Hay, as Trustees of Gordon Campbell Kevin Syndicate.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF MONTANA,
County of Fergus, ss:

Harry O. Williard, being first duly sworn, deposes and says:

That he, together with C. W. Hay, and W. W. Wheaton are the duly elected, qualified and acting Trustees of Gordon Campbell-Kevin Syndicate, a common law trust; that

Affiant makes this Affidavit for and on behalf of said Gordon Campbell-Kevin Syndicate and his co-trustees in support of a Motion herein;

That on the 15th day of January, A. D. 1925, in an action instituted against said Trustees and said Gordon Campbell-Kevin Syndicate in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, by Gordon Campbell Petroleum Company, a corporation, on an alleged cause of action on an account stated, the Plaintiff in said last mentioned action caused to be filed an Affidavit for an Attachment in due form, and caused to be executed an Undertaking on Attachment, executed by Federal Surety Company, a corporation, and which Affiant alleges is the corporation named as a defendant in the above entitled action; that thereafter such pro-
[fol. 52] ceedings were had and made in the said action so instituted by said Gordon Campbell Petroleum Company that a judgment was duly given and made in said District Court in favor of said Gordon Campbell Petroleum Company against the said Syndicate and the then trustees thereof, for the sum of $40,903.94, with interest at the rate of eight per cent per annum from March 4, 1924, together with costs, amounting in all to $45,448.24;

That thereupon the said Gordon Campbell Kevin Syndicate and its said Trustees appealed from the said judgment to the Supreme Court of the State of Montana therefrom and on the 28th day of January, 1926, the said judgment so entered in favor of said Gordon Campbell Petroleum Company against said Syndicate and its said Trustees was reversed and the said cause was remanded to the said District Court of Cascade County with directions to enter judgment in favor of said Syndicate and its said Trustees and against the Plaintiff, all of which was done, and all of which proceedings on appeal appear in Vol. 75 of the Montana Reports, page 261;

That thereafter the said Gordon Campbell-Kevin Syndicate and its then Trustees commenced an action in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, against said Federal Surety Company for the sum of $10,000.00, together with interest at the rate of eight per cent per annum from the 2nd day of March, 1926, amounting to the sum of $14,968.90, besides costs of suit amounting to $10.50, all of which appears as is fully set forth in a full, true and

correct copy of the Judgment Roll in said last named action, hereunto annexed, marked Exhibit No. 1 and by reference thereto made a part hereof;

That during and throughout the said proceedings in said last named cause, the said Defendant, Federal Surety Company, was represented by duly and regularly licensed and admitted attorneys and counsellors at law, and who were duly and regularly notified of the setting for trial of said action, and who were present thereat, and who made no other or further motions or objections than are set forth in [fol. 53] the minutes of the Court, contained in said Judgment Roll, and that said Judgment, as set forth in said Judgment Roll, was duly given and made on the 20th day of May, 1932, and that no appeal has been perfected therefrom, or sought therein, nor has any Bill of Exceptions been tendered or offered within the time allowed by law therefor, nor has the time therefor been extended in any manner, and that due notice of entry of judgment therein was given, all as set forth in copy thereof, hereunto annexed, marked Exhibit No. 2 and by reference thereto made a part hereof;

That thereafter Affiant and his co-plaintiffs and said Syndicate caused to be issued out of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, aforesaid, in said cause, so instituted by them against said Federal Surety Company, a Writ of Execution, signed by the Clerk of Court thereof and sealed with the seal of said Court, and directed to the Sheriff of Lewis and Clark County, Montana, and that thereupon the said Sheriff of Lewis and Clark County, Montana, duly levied upon certain property and bonds of said Federal Surety Company in the hands of A. H. Stafford, Commissioner of Agriculture of the State of Montana, amounting to about $19,000.00 and Affiant exhibits hereto, as Exhibit No. 3, a full, true and correct copy of said Writ of Execution and, thereafter, on or about the 26th day of May, 1932, the said Sheriff of Lewis and Clark County made a further levy upon the sum of about $8,500.00 of funds in the hands of the Clerk of the District Court, in and for Lewis and Clark County, Montana, belonging to the said Federal Surety Company, its officers or agents, in trust therefor, and that while, as Affiant is informed and believes, the same was not necessary, the consent and ratification of this Honorable Court therefor in

the above entitled action was obtained on the 24th day of May, 1932, all of which appears in the files and records in the above entitled action, to which reference is hereby made;

That thereafter a Motion was made to discharge and [fol. 54] annul the said Order of May 24th, so granting leave to levy the said Execution and ratifying the same, all of which appears in the files and records herein; that thereafter this Honorable Court did sustain the said Motion to so annul the said Order, all as appears in the files and records herein;

That Affiant and his said co-trustees and the said Gordon Campbell-Kevin Syndicate have not collected the said Judgment, and the same remains wholly unpaid, but as Affiant is informed and believes, together with the said judgment of Affiant, his co-trustees and said Gordon Campbell-Kevin Syndicate, there are Montana creditors of said Federal Surety Company having claims and demands aggregating in the neighborhood of about $25,000, and that the total known assets of said Federal Surety Company in the State of Montana are represented by the said funds in the hands of said Treasurer of the Industrial Accident Board and in the hands of the Clerk of the Court of Lewis and Clark County, Montana, as aforesaid; that Affiant is further informed and believes that the liabilities of said Federal Surety Company are such that after all of its assets are marshalled in the State of Iowa, only a few cents on the dollar will remain to be paid the creditors of said Federal Surety Company; that such information was directly obtained by the Attorneys for Affiant, and his said co-trustees, from the direct and responsible authority of one of the attorneys for said Federal Surety Company and its alleged Receiver in the State of Iowa;

That the Order and Decree of this Court, made on the 25th day of August, 1932, directing the Receiver herein to collect the assets aforesaid, and ultimately transmit the same out of this jurisdiction, was made and entered without Notice to Affiant, his co-trustees or the said Gordon Campbell-Kevin Syndicate, or the attorneys therefor, and without their presence, and that if the said Order stands and remains as the Order of this Court, Affiant and his co-trustees will be greatly injured and damaged in common with all of the Montana creditors, including the State of

Montana, who is one of said creditors, of said Federal [fol. 55] Surety Company;

That the defendant, Federal Surety Company, is and at all of the times herein mentioned was a foreign surety company organized under the laws of the State of Iowa and transacting a surety company business within the State of Montana until the 25th day of September, 1931, and that in connection with the business of said Federal Surety Company within the State of Montana it complied with the requirements of the law of the State of Montana regulating the admission of such companies to transact business in the state, and appointed in writing the Insurance Commissioner of this state to be the attorney of said Federal Surety Company in this state upon whom all process in any proceeding against such company could be served and by the terms or said power of attorney, the said Federal Surety Company did stipulate and agree on its part that any lawful process against the Federal Surety Company which was served on said attorney should be of the same legal force and validity as if served upon the said company, and that the said authority of said attorney should continue in force so long as any policy or liability of said Federal Surety Company remained outstanding against the said Federal Surety Company in the State of Montana; and a certificate of such appointment duly certified and authenticated was filed in the office of the Insurance Commissioner of the State of Montana a long time prior to the 25th day of September, 1931, and said Certificate was not, in any manner, revoked, vacated or annulled.

Harry O. Williard.

Subscribed and sworn to before me this 29th day of August, A. D. 1932. My commission expires June 26th, 1934. C. C. Williamson, Notary Public for the State of Montana, Residing at Lewistown, Montana. (Seal.)

[fol. 56] EXHIBIT NO. 1 TO AFFIDAVIT

Judgment Roll

IN THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FERGUS

HARRY O. WILLIARD, C. W. HAY, and W. W. WHEATON, as Trustees of the Gordon Campbell-Kevin Syndicate, a Common-law Trust, Plaintiffs,

vs.

FEDERAL SURETY COMPANY, a Corporation, Defendant

Amended Complaint

Plaintiffs complain and allege:

I

That on or about the month of April, 1925, by virtue of Articles of Trust in writing, signed and executed by Gordon Campbell, Helen M. Campbell and L. C. Stevenson, there was created a common law trust, to operate under the name of Gordon Campbell-Kevin Syndicate; that said common law trust still exists and operates and has existed and operated at all times hereinafter mentioned since its organization, with its principal office and place of business designated and being at Lewistown, Montana; that during the month of January, 1925, and down to the month of January, 1926, the trustees of said common law trust, duly and regularly elected, qualified and acting, were Harry O. Williard, W. D. Roy and E. M. Harvey; that since the 5th day of January, 1926, the trustees of said common law trust, were the above named plaintiffs, Harry O. Williard, C. W. Hay and W. W. Wheaton, who at all times since have been and still are the duly and regularly elected, qualified [fol. 57] and acting trustees of the said common law trust;

II

That at all times hereinafter mentioned, the defendant, Federal Surety Company, was, and still is a corporation, created, organized and existing under and by virtue of the

laws of Iowa, but duly licensed and authorized, to do and transact business in the State of Montana, and at all of said times and at the present time having and maintaining its duly constituted agent in the State of Montana for the purpose of transacting business in the State of Montana *for the purpose of transacting business in the State of Montana*, and upon whom service of process in any action against it may be made;

III

That on or about the 15th day of January, 1925, the Gordon Campbell Petroleum Company commenced an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, by filing a verified complaint against the said common law trust, Gordon Campbell-Kevin Syndicate, plaintiff, and its then trustees, Harry O. Williard, W. D. Kay and E. M. Harvey, on an alleged cause of action based upon an alleged account stated, for the sum of Forty-One Thousand ($41,000.00) Dollars, and in the said action caused to be executed in behalf of said plaintiff, an affidavit for attachment, and furnished and provided an undertaking on attachment in the sum of Ten Thousand Dollars ($10,000.00), a copy of which said Undertaking on attachment is hereto appended, marked Exhibit "A", and by reference thereto made a part hereof, and which said undertaking on attachment was duly and regularly executed for and in behalf of said attachment by the said defendant, Federal Surety Company; that the reference in said bond to Gordon Campbell-Kevin Syndicate, a corporation, was intended to describe the above named plaintiff; that said obligation was to be performed at the place of business of plaintiff at Lewistown, Fergus County, Montana; that at the said time, the said Syndicate was the owner of a large [fol. 58] amount of oil and gas property consisting of oil and gas leases, all in the Kevin Sunburst Oil Field in the County of Toole, State of Montana, and books of account and office furniture and fixtures, and plaintiffs aver that all of the same were properly classified and described as chattel or personal property and chattels real, or property partaking both of the nature of personal property and real estate, and that the said plaintiff in the said action so filed in the said District Court of the Eighth Judicial District

of the State of Montana, in and for the County of Cascade, caused writs of attachment to issue out of said court, signed by the Clerk thereof and attested by the seal of said Court and directed to the Sheriffs of Toole and Cascade Counties, Montana, with instructions to the said Sheriffs of Toole County and Cascade County, Montana, to levy upon all of the property and property rights of the said Gordon Campbell-Kevin Syndicate, a common law trust, and that in obedience to the said writs of attachment the said sheriffs, on or about the 15th day of January, 1925, seized and levied and placed a cloud upon all and singular the property of the said Gordon Campbell Kevin Syndicate, including all of the oil and gas leases belonging to the Gordon Campbell-Kevin Syndicate, in the said Kevin Sunburst Oil field; that in complying, or attempting to comply with the said instructions of the attorney for plaintiff, in said action, and in said writ of attachment, the said Sheriff of Toole County, Montana, on the 17th day of January, 1925, filed in the office of the County Clerk and Recorder of Toole County, Montana, a copy of said writ of attachment, together with a description of the property standing upon the records of the said County in the name of the defendant, Gordon Campbell-Kevin Syndicate, in said action, and a notice that the same was attached, and also a description of the leasehold interests belonging to the said defendant, Gordon Campbell-Kevin Syndicate, or defendants, and standing in the name of some other person therein designated by name, and a notice that such property and any interest of the defendant, Gordon Campbell-Kevin Syndicate, or defendants, therein was attached a [fol. 59] copy of the said instrument so filed in the office of the County Clerk and Recorder in Toole County is hereunto attached, marked Exhibit "B", and by reference thereto hereof made a part; that by reason of said levy or attempted levy of said writ of attachment, plaintiffs' title to all of the property described in said Exhibit "B" was clouded and rendered unmarketable and unmerchantable; that immediately after the commencement of the said action by the said Gordon Campbell Petroleum Company in the said District Court against the said Gordon Campbell-Kevin Syndicate, and its then Trustees, the said trustees consulted with and employed Belden & DeKalb and Merle C. Greene, of Lewistown, Montana, and Louis P.

Donovan of Shelby, Montana, attorneys at law, for the purpose of dissolving and annulling the said attachment, and securing a release of the said property from attachment, and removing such cloud and encumbrance and that the said attorneys entered upon their said employment but advised the said Gordon Campbell-Kevin Syndicate, and its then trustees, that they could find no formal defects entitling them to move summarily for a dissolution of said attachment, and the removal of the said cloud created thereby, and that it would be necessary to seeure a dissolution of the said attachment and removal of the said cloud created thereby by and through a defense on the merits of said cause, and that insofar as the merits of said cause were concerned, it was their opinion that the plaintiff, Gordon Campbell Petroleum Company, was a company possession three directors, two of whom were, at the time of the alleged statement of account, trustees of the Gordon Campbell-Kevin Syndicate, with whom said account was alleged to have been stated, and that the Gordon Campbell Petroleum Company was largely owned and controlled by Gordon Campbell, who was also one of the said trustees of the said Syndicate at that time; and that the said attorneys did undertake to secure a dissolution of the said attachment and removal of such cloud by such defense, and that so far as the merits of the said cause were concerned, the said attorneys advised that they expected to experience but little difficulty and that the [fol. 60] action, in and of itself, would offer little or no embarrassment to the defendants aside from the issuance of said writ of attachment and the levy or attempted levy thereupon and cloud created thereby upon all of the said property of the said defendant, Gordon Campbell-Kevin Syndicate, or defendants, and that by reason of the issuance of said writ of attachment, the said trustees of Gordon Campbell-Kevin Syndicate were obliged to employ, and did employ, the said attorneys above named for the purpose of dissolving the said attachment and removal of the cloud created thereby by and through such defense on the merits, for a reasonable fee, which plaintiffs alleged to be Twelve Thousand Five Hundred ($12,500.00) Dollars; that there was no other available means of testing the right of the said Gordon Campbell Petroleum Company to the issuance of the said writ of attachment except by

a trial of said action upon the merits; that the said attorneys entered upon said employment and consented to, and did, defeat the said action for the said purpose; and that thereafter, on or about the 15th day of February, 1926, the defendants in said action, Gordon Campbell-Kevin Syndicate, and the trustees thereof, recovered a judgment in said action duly given and made by the Supreme Court of the State of Montana, and the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, duly given, made and entered pursuant to the remittitur issued out of the Supreme Court of the State of Montana, and whereby the said writ of attachment and levies and attempted levies made thereunder, and clouds created thereby, were dissolved and annulled and set aside.

IV

That the said issuance of said writ of attachment and the levy and cloud created thereby was and were wrongful and was maintained under the said action by the Gordon Campbell Petroleum Company from the 15th day of January, 1925, to on or about the 15th day of February, 1926, and that during the maintenance of said action, the said properties so attached and clouded by and through the said writ, and the levy and attempted levy thereof, became [fol. 61] greatly depreciated in value since the said properties consisted wholly of oil and gas leases and property capable of rapid depreciation in value by and through the efflux of time and were, during the time the said attachment and the cloud created thereby were maintained, properties which plaintiffs could and would have sold except they were prevented by said attachment and cloud; that the said properties depreciated in value during the period of time the same were held under said attachment and the cloud created thereby, in the sum of Twenty-five Thousand ($25,000.00) Dollars; and that plaintiffs did sell certain of its said property interests as hereinafter set forth; that by reason of the issuance of said writ of attachment and the cloud created thereby upon the said properties of plaintiff, and particularly upon the oil and gas leaseholds standing in the name of Lee M. Ford, trustee, as described in Exhibit "B" hereunto attached, plaintiff was prevented from selling the said properties standing in the name of

Lee M. Ford, trustee, or any thereof, during the time that said cloud existed upon plaintiffs' title thereto at the reasonable market value thereof, or at any value except a sum greatly less than the reasonable market value of said oil and gas leaseholds, and that if it had not been for the issuance of said writ of attachment, plaintiff could and would have sold said oil and gas leaseholds standing in the name of Lee M. Ford, trustee, in or about the month of September, 1925, at the reasonable market value thereof, but by reason of the issuance of the said writ of attachment, and the levies and attempted levies made thereunder, plaintiff was obliged to sell and did sell on or about the month of September, 1925, the said oil and gas leaseholds standing in the name of said Lee M. Ford, Trustee, at a price approximately Sixty Thousand Dollars ($60,000.00) less than the reasonable market value thereof, if the said writ of attachment had not been issued, and a price approximately Sixty Thousand Dollars ($60,000.00) less than the amount at which plaintiff could and would have sold the same if the said writ of attachment had not been issued; that in the conduct and defense of said action in which the [fol. 62] said writ of attachment was issued, the said defendants in said action necessarily incurred expense in maintaining their said defense, for the purpose of securing the dissolution of the said attachment and the removal of said cloud, in the sum of Four Hundred Eighteen and 70/100 ($418.70) Dollars, which consisted of items which could not be taxed as costs in said action but which arose and were incurred as follows, to-wit: In the sum of Thirty-two and 10/100 Dollars ($32.10), which was necessarily incurred in good faith by securing from one Dudley Crowther, a court reporter, a transcript of certain testimony of Gordon Campbell given in an action instituted in the district court of the Nineteenth Judicial District of the State of Montana, in and for Toole County, germane to questions arising in the said action in which the said attachment was so issued, and to be used for impeachment purposes; and in the further sum of Three Hundred Eighty-six and 60/100 Dollars ($386.60), paid to one W. B. Finlay, certified public accountant, for services rendered the said Gordon Campbell-Kevin Syndicate in making an audit of the books, papers, and records of the said Syndicate, then held under attachment in said action, so insti-

tuted in the said District Court of the Eighth Judicial District, all necessarily incurred in good faith for the purposes of enabling the said Gordon Campbell-Kevin Syndicate to make an intelligent presentation of its defense in said action for the purpose of securing a dissolution of said attachment, and made necessary by unprecedented action of the said Gordon Campbell Petroleum Company in attaching in said action all and singular the books, records and papers of the said Syndicate, then in its own hands, and placing the same in the hands of the Sheriff of Cascade County, Montana, and thereby preventing the possession thereof by the said Gordon Campbell-Kevin Syndicate; that there were further taxed as costs in said action the sum of Five Hundred Sixty-one and 80/100 Dollars ($561.80), none of which have been paid; . .

V

That plaintiffs have been damaged by the wrongful is- [fol. 63] suance and levy of the said attachment, and resulting cloud, in the several amounts above set forth all of which said sums were damages proximately incurred by virtue of the said attachment, and cloud, none of which have been paid by the defendant; that plaintiffs have made demand upon said defendant for the payment of the full amount of its liability under said bond, but defendant has failed, neglected and refused to pay plaintiffs said sum or any part thereof.

Wherefore Plaintiffs pray judgment against the said defendant in the sum of Ten Thousand ($10,000.00) Dollar-, together with their costs and disbursements herein expended and incurred, together with interest on said sum from the 28th day of January, 1926.

Belden & DeKalb, Merle C. Groene, Louis P. Donovan, Attorneys for Plaintiffs.

(Duly verified.)

EXHIBIT "A" TO EXHIBIT 1

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR CASCADE COUNTY

GORDON CAMPBELL PETROLEUM COMPANY, a Corporation, Plaintiff,

vs.

GORDON CAMPBELL KEVIN SYNDICATE, a Corporation; HARRY O. WILLIARD, E. M. Harvey, W. D. Roy, as Trustees of Gordon Campbell Kevin Syndicate, Defendants

Undertaking on Attachment

Whereas, the above named Plaintiff has commenced or [fol. 64] is about to commence, an action in the above entitled Court against the above named Defendants, to recover of Defendants, Gordon Campbell Kevin Syndicate, a corporation, Harry O. Williard, E. M. Harvey, W. D. Roy, as Trustees of Gordon Campbell Kevin Syndicate, the sum of Forty-one Thousand Six Hundred Fifty-one and 07/100 Dollars with 6 per cent per annum interest on the sum of $40,903.94 from the 3rd day of March, 1924, and on the sum of $747.07 from Jan. 1, 1925, alleged to be due and owing from said Defendant to said Plaintiff and is about to issue out a Writ of Attachment in said action against the property of said Defendants as allowed by law in such cases, and have made the necessary affidavit therefor.

Now, therefore, in consideration of the premises, and of the issuing of said Writ of Attachment, we, the undersigned Sureties, residents of said County, State of Montana, hereby undertake and bind ourselves in the sum of Ten Thousand Dollars, that if the Defendant recover judgment in said action, or if the Court shall finally decide that the plaintiff was not entitled to any attachment, the Plaintiff will pay all costs that may be awarded to the Defendant, and all damages he may sustain by reason of the issuing out of the attachment not exceeding the sum of Ten Thousand and No/100 Dollars.

Witness our hands this 15th day of January, A. D. 1925.

Federal Surety Company, by D. A. Crichton, Attorney-in-fact.

(Duly verified.)

Filed Jan. 15th, 1925.

George Harper, Clerk. J. E. Hilgard, Deputy Clerk. (Seal.)

[fol. 65] EXHIBIT "B" TO EXHIBIT 1

Notice of Attachment

GORDON CAMPBELL PETROLEUM COMPANY, a Corporation, Plaintiff,

vs.

GORDON CAMPBELL-KEVIN SYNDICATE, HARRY O. WILLIARD, E. M. Harvey, and W. D. Roy, as Trustees of the Gordon Campbell Kevin Syndicate, Defendants

Notice is hereby given that by virtue of a Writ of Attachment issued out of the Eighth Judicial District Court of the State of Montana, in and for the County of Cascade, I have this day attached all right, title and interest of the above named Defendants *Defendant* in the following described property, to-wit:

Lessor	Description	Sec., twp., rge.
H. F. Altman	E. ½ NW. ¼, S. ½ NE. ¼	15, 34, 3 W.
A. L. Beaupre	W. ½ SW. ¼	5, 35, 2
	N. ½ N. ½	27, 34, 3
C. E. Carlson and W. R. C. Stewart	NE. ¼ NE. ¼, W. ½ E. ½, SE. ¼ SE. ¼	25, 35, 3
Elmer Dahlquist	W. ½ SE. ¼	21, 35, 3
Robert Davidson	E. ½ NE. ¼	28, 35, 3
Albert Goeddertz, Jr	NW. ¼ NE. ¼, E. ½ NW. ¼, SWNW. ¼	11, 36, 3
	SESE	17,
	E. ½ NE	20
	NW. ¼ NW. ¼	21
Albert Goeddertz, Jr	NE. ¼, N. ½ SE. ¼	16, 35, 3
Albert Goeddertz, Sr	SWNW., NWSW	6, 36, 2
	N. ½ N. ½, SENW., SENE	19, 36, 2
[fol. 66]	SENE., NESE	1, 36, 3
	NESE	10
	SW. ¼	8
	NENE., S. ½ NE. ¼, SWNW	
	SW. ¼, N. ½ SE., SWSE	15
	E. ½ NE	21
	W. ½ NW	22
	S. ½ NW., NWSW	27
	N. ½ NW., N. ½ SE., SWSE., SESW	28
	S. ½ S. ½	30
Albert Goeddertz, Sr	S. ½ SE	19, 36, 2
	SESE	22, 35, 3
	SENW., E. ½ SW., NWSE	26
	SENE	34
Martin Goldrick	W. ½ W. ½	20, 36, 3
Gideon Gunderson	Lots 1 & 2	19, 35, 2
	N. ½ NE	24, 35, 2
G. C. Larson	W. ½ SE., E. ½ SW	7, 35, 2
Imilda Larson	E. ½ SW	17, 35, 2
R. C. Lehman	S. ½ NW	3, 34, 3
John E. Lewis	E. ½ E. ½	5, 34, 3

Lessor	Description	Sec., twp., rge.
Mary Solberg	W. ½ NE.	29, 35, 3
Alice Steven	NE. ¼, E. ½ SE.	32, 35, 3
J. J. Stinson	SW. ¼	29, 34, 3

I

You will also attach all the right, title and interest of the Gordon Campbell-Kevin Syndicate in and to those certain oil and gas leases standing of record in the name of Lee M. Ford, Trustee, covering the following described lands situated in the County of Toole, State of Montana, and de-
[fol. 67] scribed as follows, to-wit:

Lessor	Description	Sec., twp., rge.
Joseph Byrne	N. ½ NW., SENW	25, 35, 2 W.
C. Lashbaugh	NE. ¼	34, 35, 2
Aurel J. Abell	NW. ¼, E. ½ SW. ¼	35, 35, 2
Edward Byrne	E. ½ SE. ¼	35, 35, 2

You will also attach all the right, title and interest of the Gordon Campbell-Kevin Syndicate in and to those certain oil and gas leases standing of record in the name of the Western Petroleum Exploration Company, covering the following described lands situated in the County of Toole, State of Montana, and described as follows, to-wit:

Lessor	Description	Sec., twp., rge.
Henry Swears	S. ½ SW. ¼	4, 35, 2 W.
Sarah Swears	SW. ¼	9, 35, 2
Anna Kenny	NE. ¼	15, 35, 2
Fenna Bruins	S. ½ S. ½	10, 35, 2
		9, 35, 2

Dated at Shelby this 17th day of January, 1925.
T. H. Daley, Sheriff, by W. B. Martin, Under Sheriff.

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF CASCADE

GORDON CAMPBELL PETROLEUM COMPANY, a Corporation, Plaintiff,

vs.

GORDON CAMPBELL KEVIN SYNDICATE, HARRY O. WILLIARD, E. M. Harvey, and W. D. Roy, as Trustees of the Gordon
[fol. 68] Campbell Kevin Syndicate, Defendants

Writ of Attachment

The State of Montana to the sheriff of Toole County, Greetings:

Whereas, The above entitled action was commenced in the District Court of the Eighth Judicial District of the

State of Montana, in and for the County of Cascade, by the plaintiff in said action, to recover from the Defendants in said action the sum of Forty-one Thousand six hundred fifty-one and 01/100 ($41,651.01) Dollars Currency of the United States, besides interest at the rate of 8 per cent per annum on $40,903.94 from March 3, 1924, and interest on $747.07 from the 1st day of January, A. D. 1925, and costs of suit; and the necessary affidavit and undertaking herein being filed as required by law.

Now, we do therefore command you, the said Sheriff, that you attach and safely keep all the property of the said Defendants within your said county not exempt from Execution, or so much thereof as may be sufficient to satisfy the said Plaintiff's demand, as above mentioned, unless the said Defendants give you security by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness H. H. Ewing, Judge of the Eighth Judicial District at the Court House in the County of Cascade, the Seal of said Court this 15th day of January, A. D. 1925.

Attest my hand and seal of said Court the day and year last above written.

George Harper, Clerk, by J. E. Hilgard, Deputy Clerk. (Court Seal.)

[fol. 69] Filed for record January 17th, 1925, at 5:00 o'clock P. M.

J. R. MacFarlane, County Recorder.

Amended Complaint endorsed on back: "Filed Jan. 31st, 1928. Bert Replogle, Clerk."

Title of Court, Title of Cause

Answer.

Comes now the defendant above named and for its answer to Plaintiffs' amended complaint served and filed on January 31, 1928, admits, denies and alleges as follows:

I

Admits the allegations contained in paragraph II of plaintiffs' said amended complaint, and denies generally

and specifically each and every other allegation, matter and thing in plaintiffs' said Complaint contained, and particularly and specifically denies that the plaintiffs have been by reason of the acts therein complained of, or by any other reason attributable to defendant, damaged as set forth in said amended complaint in the sums therein mentioned, or in any other sum or sums at all.

Wherefore Defendant, having fully answered plaintiffs' amended complaint, prays that the plaintiffs take nothing and that the defendant have judgment for its costs; and for such other and further relief as is meet, just, legal and equitable in the premises.

Ayers & Polutnik, Attorneys for Defendant.

(Duly verified.)

Answer endorsed on back: "Filed this 29 day of Feb. A. D. 1928. Bert Replogle, Clerk of Court, by C. Smith, Deputy Clerk.

[fol. 70] Title of Court and Cause

#14567

Court Minute

Friday, the 20th day of May, 1932.

This matter came on regularly for trial this day having been continued from May 19th, 1932, H. Leonard DeKalb appearing as counsel for the Plaintiffs, and Robert C. Ayers of the firm of Ayers & Ayers appearing as counsel for the Defendant. Counsel for the Plaintiffs thereupon informed the Court that they were ready for trial and counsel for the Defendant informed the court that they were not ready for trial. The case was thereupon called for trial and the following witnesses were sworn and testified on behalf of the plaintiffs, to-wit: Harry O. Williard and H. Leonard DeKalb.

Proof having been submitted and the Court being fully advised in the premises, judgment is ordered in favor of the Plaintiffs.

IN THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FERGUS

HARRY O. WILLIARD, C. W. HAY, and W. W. WHEATON, as Trustees of the Gordon Campbell-Kevin Syndicate, a Common-law Trust, Plaintiffs,

vs.

FEDERAL SURETY COMPANY, a Corporation, Defendant

Judgment.

This cause came on regularly for trial before the Court, O. F. Goddard, a Judge of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, sitting in the place of the Judges of the Tenth Judicial District, disqualified, and having been regularly [fol. 71] called to preside in the above entitled action, this 20th day of May, A. D. 1932, the cause having been duly and regularly set and noticed for trial, and notice having been given the respective parties, the Plaintiffs appearing in person and by and with their counsel, Belden & DeKalb, and the Defendant not appearing at the trial, and the default of the Defendant having been duly and regularly entered for such non-appearance, the Court proceeded to hear the sworn testimony and the evidence introduced in support of the allegations of the Complaint, and the law and the evidence being by the Court considered,

And the Court being fully advised in the premises, and it appearing that Plaintiffs are entitled to a judgment against the Defendant for the relief prayed for in their Complaint,

It is accordingly ordered, adjudged and decreed that Plaintiffs do have and recover of and from the Defendant, Federal Surety Company, the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of eight per cent per annum from the 2nd day of March, 1926, making a total judgment, for principal and interest, of Fourteen Thousand Nine Hundred Sixty-eight and 90/100 Dollars ($14,968.90), and for Plaintiffs' costs

and disbursements herein expended and incurred, hereby taxed at the sum of Ten and 50/100 Dollars ($10.50).

Done in open court this 20th day of May, A. D. 1932.

O. F. Goddard, Judge of the Thirteen-Judicial District of the State of Montana, Presiding in said Cause.

Endorsed: Filed May 20th, 1932. B. W. Walker, Clerk, by J. E. Walker, Deputy Clerk.

Judgment roll endorsed: Filed this 21st day of May, [fol. 72] A. D. 1932. B. W. Walker, Clerk of Court, by C. Smith, Deputy Clerk.

EXHIBIT NO. 2 TO AFFIDAVIT

IN THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FERGUS

HARRY O. WILLIARD, C. W. HAY, and W. W. WHEATON, as Trustees of the Gordon Campbell-Kevin Syndicate, a Common-law Trust, Plaintiffs,

vs.

FEDERAL SURETY COMPANY, a Corporation, Defendant

Notice of Entry of Judgment

To the above-named defendant and to its attorneys, Messrs. Ayers & Ayers and Donald Campbell:

You are hereby notified that on this 20th day of May, A. D. 1932, Judgment was rendered in the above entitled action, in favor of the Plaintiffs and against the Defendant for the relief demanded in Plaintiffs' Complaint.

Dated this 20th day of May, A. D. 1932.

Louis P. Donovan, Belden & DeKalb, Attorneys for Plaintiffs.

Service of within Notice had and received by copy thereof this 20th day of May, 1932.

Ayers & Ayers, Attorneys for Defendant.

Endorsed: Filed May 27, 1932.

[fol. 73] EXHIBIT NO. 3 TO AFFIDAVIT

IN THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF FERGUS

The State of Montana to the sheriff of Lewis and Clark County, in the State of Montana, Greeting:

Whereas, on the 20th day of May, A. D. 1932, Harry O. Williard, C. W. Hay and W. W. Wheaton, as Trustees of the Gordon Campbell-Kevin Syndicate, a common law trust, recovered a Judgment in the said District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, against Federal Surety Company, a corporation, for the sum of Fourteen Thousand Nine Hundred Sixty-eight and 90/100 Dollars ($14,968.90), damages, with interest thereon at the rate of eight per cent per annum until paid, together with $10.50 dollars costs and disbursements at the date of said judgment, and accruing costs, amounting to the sum of $14,979.40, as appears to us of record;

And whereas, the judgment roll, in the action in which said judgment was ordered, is filed in the Clerk's office of said Court, in the County of Fergus, and said Judgment was docketed in said Clerk's office, in said County, on the day and year first above written; and the sum of $14,979.40, with interest at the rate of eight per cent per annum from the 20th day of May, 1932, is now at the date of this Writ actually due on said judgment;

Now, you, the said sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy said judgment, out of the personal property of said debtor, or if sufficient personal property of said debtor cannot be found, then out of the real property in your County belonging to said debtor, on the day wherein said judgment was docketed in said County, or at any time thereafter; and make return of this writ within sixty days after the receipt [fol. 74] hereof with what you have done endorsed thereon.

Witness the Honorable O. F. Goddard, the Judge who tried said cause, sitting in place of the Judges of the Tenth Judicial District of the State of Montana, disqualified, at

the Court House in the County of Fergus, this 20th day of May, A. D. 1932.

Attest my hand and the seal of said Court the day and year last above written.

B. W. Walker, Clerk, by J. A. Walker, Deputy Clerk.

(Seal.)

That thereafter, the same came on by consent of all of said counsel for hearing on said 31st day of August, 1932, and, at said time, the said attorneys for Plaintiff and for Defendant, E. W. Clark, presented, served and filed their objections to said Motion, in the words and figures as follows, to-wit:

OBJECTIONS TO MOTION TO VACATE ORDER AND DECREE—
Filed Aug. 31, 1932

Comes now E. W. Clark, Receiver and Liquidating Officer of Federal Surety Company, and D. A. Crichton, as Receiver of the Federal Surety Company of Davenport, Iowa, by and through their attorneys Molumby, Busha & Greenan, and Gunn, Rasch, Hall & Gunn, and objects to the Motion made on behalf of Gordon Campbell-Kevin Syndicate by and through its attorneys L. P. Donovan and Belden & DeKalb asking to modify the Order Confirming the appointment of the Receiver duly made and given by this Court on the 25th day of August, 1932, upon the grounds and for the reason that if said Motion is sustained it would, in violation of Section 1, Article IV of the Constitution of the United States, deny full faith and credit to the public acts, records and judicial proceedings of the State of Iowa, made [fol. 75] and entered in the District Court of the State of Iowa, in and for Scott County, a court of general jurisdiction, in the case entitled State of Iowa, ex rel. John Fletcher, Plaintiff, vs. Federal Surety Company of Davenport, Iowa, Defendant, being cause No. 28238 in equity, in which cause said Federal Surety Company by decrees of said court, duly made and entered on September 25th, 1931, and December 22nd, 1931, was dissolved and E. W. Clark, Commissioner of Insurance of the State of Iowa, was then duly appointed statutory receiver and/or liquidating officer of said Federal Surety Company, and vesting in him title to

all property of said Federal Surety Company wherever situated, all of which is more fully shown in the duly exemplified copies of said decrees attached to and made a part of the answer and cross-petition of E. W. Clark as Receiver and/or Liquidating Officer of the Federal Surety Company of Davenport, Iowa, filed in this action pending in the district court of Cascade County, Montana, on the 25th day of August, 1932, to which decrees reference is hereby made.

Also, upon the further ground and for the reason that said motion, if sustained, would, in so far as it may enable resident creditors in Montana to secure a priority over non-resident creditors of the Federal Surety Company in the distribution of assets or payment of claims, constitute a violation of Section 2 of Article IV of the Constitution of the United States.

Gunn, Rasch, Hall & Gunn, Molumby, Busha & Greenan.

In conjunction therewith, the following facts were stipulated, to-wit:

STIPULATION AS TO FACTS

The moving parties, Harry Williard, W. W. Wheaton and C. W. Hay, as Trustees of the Gordon Campbell-Kevin Syndicate, and Gordon Campbell, admit that the statutory provisions of the State of Iowa in force at the time set forth [fol. 76] in the complaint and cross-complaint in this action are correctly set forth in the said complaint and cross-complaint, and the said moving parties further admit that the copy or copies of judgments and orders attached to the cross-complaint in this action are true and correct copies of the original judgment and orders, given and made by the District Court of the State of Iowa, in and for Scott County, in the action entitled State of Iowa, ex rel. John Fletcher, plaintiff, vs. Federal Surety Company of Davenport, Iowa, defendant.

It was further agreed between the parties that each of the parties to the proceeding waived notice and time of

hearing of said Motions, and agreed that the same be forthwith heard and submitted to the Court and, in accordance therewith, the same were forthwith heard and submitted to the Court.

The following further proceedings were had on the said 31st day of August, 1932, and entered on the minutes of the Court, to-wit:

MINUTE ENTRIES

The Court: Let the record show that all the motions are denied.

Mr. Donovan: Let us ask for an order staying the proceedings for sixty days insofar as possession is concerned.

Mr. DeKalb: If it is understood that the Receiver will not dispose of or send any of this money out of the State of Montana until the appeal is disposed of.

Mr. Molumby: We will agree to that. Let the record show that.

Mr. DeKalb: It is agreed and understood by and between the plaintiff, the defendant and the petitioning creditor, Gordon Campbell Syndicate, and its trustees, that the Court shall make an order that none of the funds upon which the creditor, Gordon Campbell Syndicate, and its trustees, have made levy, shall be sent from the State of Montana, or otherwise disposed of than to remain in the custody of the Receiver until the determination of the pro- [fol. 77] posed appeal of the Gordon Campbell-Kevin Syndicate.

The Court: The Court hereby orders that the Receiver retain in his possession the property upon which the foregoing creditor has a levy and execution until further order of the Court.

Mr. Donovan: May the record show that Harry Williard, W. W. Wheaton and C. W. Hay take exception to the orders of the Court, denying their motion to vacate the order confirming the Receiver, and also take exception to the order of the Court denying their Motion to modify the said order, and they ask for thirty days in addition to the time allowed by law in which to prepare, serve and file their bill of exceptions.

The Court: Let the time be granted.

That on the 1st day of September, 1932, said D. A. Crichton petitioned the Court as follows:

PETITION FOR APPOINTMENT OF COUNSEL FOR RECEIVER—Filed Sept. 1, 1932

Comes now D. A. Crichton, and respectfully represents to the Court that it is necessary to have the services and advice of counsel in the above entitled matter; that he has consulted the firm of Molumby, Busha & Greenan, as such counsel, and is desirous of appointing them to act on behalf of the Receiver in all matters with reference to said Receivership.

Wherefore your Petitioner prays that he be permitted to employ the services of Molumby, Busha & Greenan as attorneys in all matters herein, and that his action in heretofore consulting and employing those services be ratified by this Court.

D. A. Crichton, Petitioner.

(Duly verified.)

[fol. 78] Whereupon the Court made an order on said Petition as follows:

ORDER ARPOINTING COUNSEL FOR RECEIVER—Filed Sept. 1, 1932

Upon reading and filing the verified Petition of D. A. Crichton, Receiver herein, and the Court being advised in the premises,

It is hereby ordered that the action of the said D. A. Crichton, as Receiver, in employing Molumby, Busha & Greenan as counsel for the Receiver, and the same is hereby ratified, and he is hereby empowered to employ their services in all matters touching said Receivership.

Dated Sept. 1, 1932.

H. H. Ewing, Judge.

Now, within the time allowed by law and the Order of Court, made herein on the 31st day of August, 1932, the said creditors, Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees of the Gordon Campbell-Kevin Syndicate, present this as their Bill of Exceptions, of and concerning the Order made on May 24th, 1932, permitting levy of exe-

cutions, as above set forth, and of and concerning their Motion to vacate and annul, and to modify the Order Confirming Appointment of Receiver, made and entered herein on the 25th day of August, 1932, which said Bill of Exceptions contains all of the evidence, or the full substance thereof, adduced and considered by the Court in the making of said Order complained of, and all of the records and proceedings in said cause, considered by the Court and pertaining to and affecting the consideration of the said Orders complained of, and pray that the same may be allowed, settled and filed herein, as a full, true and correct Bill of Exceptions herein.

Dated this 14th day of September, A. D. 1932.

[fol. 79] Louis P. Donovan, Belden & DeKalb, Attorneys for Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a Creditor Affected Thereby.

ORDER SETTLING BILL OF EXCEPTIONS—Filed Oct. 13, 1932

STATE OF MONTANA,
County of Cascade, ss:

I, H. H. Ewing, one of the Judges of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, hereby certify:

That I am the Judge who passed upon and made the Orders excepted to, as shown in the foregoing Bill of Exceptions, and I further certify that the foregoing Bill of Exceptions was duly served upon all counsel for Plaintiff and Defendant, in the above entitled action, and duly and regularly came on for settlement and allowance and,

It is accordingly hereby further certified that the same is a full, true and correct Bill of Exceptions, containing all of the evidence, proceedings, papers and files and records of and pertaining to, and considered by, the undersigned, in the making and entry of the Judgment and Orders excepted to herein.

Done in Open Court this 13 day of October, A. D. 1932.

H. H. Ewing, District Judge.

NOTICE OF APPEAL—Filed Sept. 18, 1932

To John Mieyr, plaintiff; to Federal Surety Company of Davenport, Iowa, a corporation; to E. W. Clark, as Re-

ceiver, and to D. A. Crichton, as Receiver, and to Messrs. Gunn, Rasch, Hall & Gunn and Messrs. Cook & Balluff and to Messrs. Molumby, Busha & Greenan, attorneys for [fol. 80] the respective parties defendant:

You and each of you will please take notice that Harry O. Williard, W. W. Wheaton and C. W. Hay, as Trustees of Gordon Campbell-Kevin Syndicate, a common law trust, and Gordon Campbell Kevin Syndicate, a common law trust, hereby appeal to the Supreme Court of the State of Montana from that certain Judgment and Order confirming Appointment of Receiver, made and entered herein on the 25th day of August, 1932, wherein and whereby D. A. Crichton was confirmed as a Receiver herein, and wherein and whereby an Order of said Court, made on May 24th, 1932, granting Appellants leave to levy execution was revoked, annulled and set aside, and also from that certain Order made and entered herein on the 31st day of August, 1932, over-ruling Appellants' Motion filed herein August 31st, 1932, attacking the said Order and Decree made and entered, as aforesaid, on August 25, 1932, all rendered and entered, as aforesaid, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against the Appellants and in favor of the Plaintiff and Defendants above named, and from the whole thereof.

Dated September 17, 1932.

Louis P. Donovan, Belden & DeKalb, Attorneys for Above-named Appellants.

(Duly served.)

[fol. 81] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 82] IN SUPREME COURT OF MONTANA

[Title omitted]

[File endorsement omitted.]

[fol. 83] OPINION PER CURIAM—Filed April 1, 1933

Defendant Federal Surety Company prior to September 25, 1931, was a corporation organized under the laws of Iowa

and authorized to do business in Montana. The district court of Scott county, Iowa, in a proceeding brought by the attorney general of that state, under statutory authority made an order on September 21, 1931, requiring the surety company to appear on September 25th and show cause why its affairs and business should not be dissolved and a receiver appointed to wind up its affairs and distribute its effects as provided by law. The order was served on the surety company and it failed to appear. The court thereupon entered a decree "that under and in accordance with the provisions of section 8964 of the Code of 1927 of the state of Iowa, the defendant, Federal Surety Company, shall be dissolved and its effects distributed." The decree also appointed E. W. Clark, commissioner of insurance of the state of Iowa, as receiver, gave him certain directions with respect to the property and the method of ascertaining and determining claims, and expressly retained jurisdiction, upon application of any party in interest, to give further orders, directions or decrees as may be necessary or proper. Clark duly qualified as receiver by filing bond and oath.

On December 22, 1931, the court, on application of the receiver, made a supplemental order and decree which recites that the court "finds, determines and adjudges: That pursuant to the power conferred by said sections, pursuant to the allegations set forth in the petition filed herein, as amended, and pursuant to good cause shown herein, as in said sections provided, this court did, on September 25, 1931, enter an order and decree in this cause, and thereby dissolved Federal Surety Company and terminated its corporate existence, and thereby appointed E. W. Clark, who [fol. 84] was and is commissioner of insurance of the state of Iowa, as the receiver and/or liquidating officer, to take title to all property of the dissolved corporation for the purpose of liquidating and distributing its assets, as by law provided. That by virtue of the statutes hereinbefore referred to, as construed by the court of last resort in the state of Iowa, and by virtue of the proceedings in this cause, the said corporation, Federal Surety Company, ceased to exist upon the entry of the order and decree herein at 4:30 P. M. Central Standard Time, September 25, 1931, and that thereupon all its agencies ended, its employees, including attorneys, were discharged, and it was put, without exception or notice of appeal, beyond all further corporate

activity, its existence was put to an end for all purposes whatsoever, so that it can neither make nor take contracts, nor sue or be sued, and so that all debts to or from it became extinguished and all actions by and against it, abated, and so that, as after death of a natural person, it can have no interest in the property theretofore by it controlled. That the defendant, Federal Surety Company, is, and since September 25, 1931, has been dissolved, and that its corporate existence is terminated, with the results hereinbefore determined. That E. W. Clark, receiver and/or liquidating officer of Federal Surety Company, is the successor to said corporation and as such holds title to all property owned by Federal Surety Company at the time it so ceased to exist."

On March 25, 1932, this action was commenced by Mieyr against the surety company and the receiver, Clark, in Cascade county, the complaint alleging a debt due plaintiff from the surety company, growing out of a policy of insurance for loss occasioned by reason of the ownership, maintenance, use and operation of a certain automobile. Mieyr in his complaint pleaded the decree of the Iowa court dissolving the corporation and appointing a receiver, and the Iowa laws authorizing the proceedings taken in the Iowa court. He alleged that the surety company had more than $50,000 [fol. 85] worth of property situated in Montana, consisting of cash and a judgment in favor of the surety company; that Clark, the receiver, through agents and representatives in this state, is attempting to compromise, settle and discount the assets and procure possession thereof and remove them from the State, and that unless a receiver is appointed in this state to take charge of and preserve the property for the Montana creditors, the same would be dissipated and lost to the creditors; that the funds should be retained in Montana until the proportionate shares of the Montana Creditors is ascertained and determined and these paid out of the Montana assets before transferring any of the funds to the Iowa receiver. The complaint asked for the appointment of D. A. Crichton as receiver to take charge of the Montana assets and to hold the same until the further order of the court. It prayed also that plaintiff be decreed to have a valid claim against the surety company.

On the day the complaint was filed, the court appointed Crichton as receiver for the Montana property, the order reciting "that the receiver be vested with all the powers and

rights of receivers appointed by this court, and with the power to take possession of all property heretobefore belonging to said Federal Surety Company of Davenport, Iowa, and to collect all sums owing said Federal Surety Company of Davenport, Iowa, and to keep and preserve the same, and manage and disburse the same, according to the further order of this court."

Crichton duly qualified as such receiver on March 26. Clark thereafter moved the court to discharge Crichton as receiver for want of jurisdiction in the court to make the appointment. This motion was denied on May 24, 1932.

On May 20, 1932, Harry O. Williard, W. W. Wheaton and C. W. Hay, as trustees of Gordon Campbell-Kevin Syndicate, a common law trust, and Gordon Campbell Syndicate, appellants here, obtained a judgment against the surety com- [fol. 86] pany in the Fergus county district court for approximately $15,000 without knowledge of the receivership proceedings in Iowa. This was after a second trial. The first resulted in a nonsuit, which judgment was reversed by this court in 91 Mont. 465, 8 Pac. (2d) 633. On May 24th these appellants appeared in this action in Cascade county by petition setting forth that they had discovered assets of the surety company within the state and had execution issued out of the district court of Fergus county upon their judgment, and requested an order permitting them to levy the execution upon such property in Montana. The request was granted with the understanding, announced by the court, that no preference over other Montana creditors was given them. On July 25 Crichton filed his petition to annul the order permitting the levy of execution and gave notice that it would be heard on August 3.

On August 3 Clark served and filed an answer and cross-petition in this action. In substance it set forth his appointment as receiver by the Iowa court and pleaded the Iowa statutes authorizing the proceedings there taken; that creditors of the surety company reside in different jurisdictions and its assets are located in such jurisdictions; that there were assets in Montana amounting to $50,000 and that certain creditors were threatening suits against such property and issuing attachments, and that an ancillary receiver should be appointed to prevent irreparable damage and preferential treatment of some creditors over others. It prayed for an order confirming title to the assets of the

surety company in Clark and confirming the appointment of Crichton as ancillary receiver of the Montana property, with authority to care for and preserve it until the further order of the court. Mieyr filed an instrument admitting the allegations of the answer and cross-petition of Clark, and joining in the request therein made.

On August 25 the court entered an order or decree finding that the corporate existence of Federal Surety Company was terminated by the proceedings in Iowa and that title to all [fol. 87] its property passed to Clark, as receiver, and should be distributed ratably to all creditors "subject to any liens and rights of creditors acquired on or prior to September 25, 1931, in or to specific property." It confirmed the appointment of Crichton as ancillary receiver, and directed that he receive proof of claims of all Montana creditors by requiring the claims to be filed with the clerk of court in Cascade county, and provided that when the claims allowed by order of the district court of Cascade county were allowed by the court in Iowa as entitled to share with other claims of similar rank, Crichton should transmit and remit to Clark all money and property in his hands as receiver, except such as were determined by the Cascade county court to be subject to specific liens, and such as was necessary to pay the costs of the proceedings in Montana, including the compensation of Crichton. It also provided that in the event claims allowed by the district court of Cascade county were not allowed in such manner as to permit claimants to share ratably with all other creditors of the surety company, then the money and property in the hands of Crichton should be retained by Crichton for distribution to creditors whose claims are allowed by order of the Cascade district court. The decree directed all persons to deliver to Crichton all money and property belonging to the surety company. It also revoked the order of May 24, 1932, granting permission to appellants to levy their execution. This appeal is from that decree or judgment, and from an order made thereafter denying appellants' motion to vacate or modify the decree.

The appeal presents the question whether appellants have the right to be paid the amount of their claim from the Montana property before any part of such property is transmitted to the Iowa receiver for administration through the Iowa receivership, when, as shown, their claim has been

reduced to judgment and execution levied after the proceedings in the Iowa court designed to accomplish the dissolution of the corporation. Solution of the problem [fol. 88] presented makes it necessary to determine the effect of the proceedings in the Iowa court upon the corporate life of the surety company.

The proceedings in Iowa were taken under section 8964 of the Iowa Codes of 1927 and 1931, which authorizes the commissioner of insurance to examine into the condition of corporations incorporated or doing business in that state. It then provides that when, upon such examination, he finds a stated condition, "he shall communicate the fact to the attorney general, who shall apply to the district court * * * for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor."

The Iowa supreme court has had occasion to pass upon the effect of proceedings under this statute, in the case of State ex rel. Attorney General v. Fidelity Loan & Trust Co., 113 Iowa, 439, 85 N. W. 638. The court in that case held that while the corporation had the right of appeal from a decree of dissolution, if the decree was acquiesced in and not appealed from, it became final and that "from the time of that entry the corporation has been dead, all its agencies ended, its employes, including attorneys, discharged; and it put, without exception or notice of appeal, beyond all future corporate activity. The effect was to 'put an end to its existence for all purposes whatsoever, and to destroy every one of its faculties so that thereafter it can neither make nor take contracts, nor sue or be sued, and so that all debts to or from it became extinguished, and all actions by and against it abated.'" * * * "To a corporation dissolution is as final as death to a person." This is the prevailing rule elsewhere (8 Fletcher, Enc. [fol. 89] Corp., sec. 5564, note 41, and cases there cited.)

Appellants contend that the order or decree of the Iowa court rendered on September 25, 1931, because of its word-

ing did not terminate the existence of the surety company, but simply adjudged that at some future time it would be dissolved. From the record it appears that Clark was first appointed temporary receiver on September 11, and thereafter, upon the filing of amendments to the petition in the Iowa court, an order was made directing the surety company to show cause "why its business should not be forthwith dissolved and a receiver appointed to wind up its affairs." The decree that followed adjudged "that under and in accordance with the provisions of section 8964, of the Code of 1927, of the state of Iowa, the defendant Surety Company, shall be dissolved and its effects distributed."

Conceding that the decree of the Iowa court resulted in a present dissolution of the surety company, the question arises: Did the action brought by the appellants abate?

The following provision is found in section 6013, Revised Codes of 1921:

"Nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred."

This section has not be construed by this court. Colorado has substantially the same legislative enactment. (Compiled Laws of Colorado 1921, sec. 2300.) Likewise the state of Illinois. (Sec. 14, Chapter 32, Hurd's Revised Statutes.) The similar provisions noted have been construed by the supreme court of each of these states. The supreme court of Colorado, in the case of Kipp v. Miller, 47 Colo. 598, 108 Pac. 164, 135 A. S. R. 236), construing their statute, said:

"The question is, can the suit be maintained against the bank, it having been instituted after the expiration of the bank's charter? We answer in the affirmative, since the cause of action arose while the charter was still in force and the bank a going concern. The dissolution of the bank did not deprive creditors of a remedy against it, although [fol. 90] sought to be applied after that time. The right of action by the creditor is clear and undisputed, and the remedy is preserved to him by express statute. Section 509, Mills' Ann. Stats., reads as follows: 'The dissolution for any cause whatever of corporations created as aforesaid, shall not take away or impair any remedy given

against such corporations, its stockholders, or officers, for any liabilities incurred previous to its dissolution.'"

That court reached the same result in the following cases construing the same statute: Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. 293; Lucifer v. Buster, 64 Colo. 179, 171 Pac. 61; Dutton Co. v. Fitzpatrick, 69 Colo. 229, 193 Pac. 549. The same result was reached by the Circuit Court of Appeals for the eighth circuit construing the Colorado statute. (Hazard v. Park, 294 Fed. 40.)

The supreme court of Illinois, in the case of Singer & Talcott Co. v. Hutchinson 176 Ill. 48, 51 N. E. 622, construing the statute of that state, speaking with reference to a dissolved corporation, said:

"These sections, therefore, continue its life, for the respective periods stated, as an entity, so that it could sue or be sued as a party to the action, and therefore its rights, as such party, are conserved the same as the rights of other parties to actions."

Clearly, if the action of appellants were held to have abated upon the entry of a decree of dissolution by the Iowa court, their remedy, which accrued long prior thereto, would be impaired. "Impaired" means to make worse, to lessen the power, to weaken, to enfeeble, to deteriorate. (Ex parte Harrison, 213 Mo. 88, 110 S. W. 709.) The action, if against a domestic corporation, would not abate; and, as we shall presently see, the same rule is applicable to a foreign corporation.

The question of continuing actions by or against a corporation after its dissolution depends upon the laws of the state in which the action is pending, and a foreign statute [fol. 91] relating thereto is of no avail. (1 C. J. 137; Sturges v. Vanderbilt, 73 N. Y. 384; Simmott v. Hamman, 141 N. Y. Supp. 505.)

Section 11 of Article XV of our Constitution provides:

"And no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

Our legislature in 1917 enacted Chapter 149, now section 6659, Revised Codes 1921, as follows: "All foreign corporations licensed to do business in the state of Montana shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers." Under the quoted section, when the surety company was licensed to do business in the state of Montana, it became subject to the liabilities and restrictions then imposed upon corporations of like character organied under the laws of this state. Suits against domestic corporations do not abate upon the entry of a decree of dissolution, and the same rule, by virtue of this statutory provision, must apply to a foreign corporation.

It is frequently said by the text writers and in decisions that the laws of the forum continuing the life of a corporation will not be extended to a foreign corporation dissolved under the laws of the state of its domicile. (8 Thompson on Corporations, sec. 6518.) But these statements all relate to statutes enacted with reference to the survival of domestic corporations after dissolution for purposes of suit. However, an examination of these authorities reveals the fact that no statute, either identical with or similar to section 6659, Revised Codes of 1921, was under consideration.

Many authorities are found in the books to the effect that a personal judgment cannot be obtained against a dissolved corporation, which is a correct statement of what might be termed the common-law rule. Substantially all the [fol. 92] states now have survival statutes which enable actions to be maintained and judgments rendered against domestic corporations subsequent to dissolution, as is disclosed by the elaborate note in 47 A. L. R. 1397 et seq., wherein the statutory provisions and decisions of the respective states are collated.

We have searched in vain to find either of these rules applied in any jurisdiction having a statute similar to our own, above noted. Therefore we hold that the suit of appellants against the surety company did not abate on the entry of the decree of dissolution in Iowa, and that the judgment entered herein is good and valid.

It then remains to determine whether the levy of the execution was valid. Solution of this question depends upon the effect of the order appointing Crichton receiver. Appellants contend that this appointment was a nullity, because the complaint of Mieyr is not sufficient upon which to base the appointment of a receiver in this state. They assert that a receiver will not be appointed at the instance of a general contract creditor.

A general creditor of a corporation has no right to the appointment of a receiver. (Scholefield v. Merrill Mortuarries, 93 Mont. —, 17 Pac. (2d) 1081; Pomeroy's Equity Jurisprudence, 4th ed., sec. 1548, p. 3630; Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. Ed. 1113, 14 Sup. Ct. Rep. 127; French Bank Case, 53 Cal. 495; Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322; State ex rel. Menzel v. District Court, 49 Nev. 145, 241 Pac. 317, 43 A. L. R. 1331.) It is sometimes said that courts on account of rapidly changing conditions in this country are gradually relaxing this rule: (Clark on Receivers, sec. 187, subd. a.) The reason for the relaxation of this rule is the result of statutory enactments, instead of the growth and change of judicial decisions.

The case of Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233, 1 A. L. R. 643, holds that a creditor of a cor- [fol. 93] poration may make application for the appointment of an ancillary receiver. The opinion in the case considers the right of a creditor to secure the appointment of a receiver as being axiomatic. Under the provisions of section 2286 of the West Virginia Statutes of 1906, in force at the time the decision was promulgated, the right to general creditors of corporations to secure the appointment of a receiver is expressly granted. The case of Popper v. Supreme Council etc., 70 N. Y. Supp. 637, is likewise based upon statutory authority for the appointment of receivers of both domestic and foreign corporations upon the application of a general creditor. An examination of the statutes of the various states reveals the fact that the legislatures thereof have from time to time increased the grounds for the appointment of receivers, and decisions from foreign jurisdictions must be read in the light of the existing statutes.

Our own Code, sections 9301 and 9303, enumerates the grounds for the appointment of receivers. Identical stat-

utes obtain in California and Nevada. The California court, in the French Bank Cases, supra, said:

"But there is no statute of this state, none to which we have been pointed, which undertakes to confer upon a private person, either as stockholder or creditor, the right to maintain an action to dissolve a corporation upon the ground that it is insolvent, or to obtain relief by seizing its property out of the hands of its constituted management, and placing it in the hands of a receiver."

The petition of the respondent Mieyr does not reveal that he occupied any other status than that of a general creditor of the Federal Surety Company.

A receiver will not be appointed unless the applicant has no other plain, speedy or adequate remedy. (Montana Ranches Co. v. Dolan, 53 Mont. 397, 164 Pac. 306.) The cause of action which Mieyr had against the Federal Surety Company, as disclosed by his complaint, was upon an express contract for the direct payment of money, and he had ample means to secure the payment of his indebtedness by obtaining the issuance and levy of a writ of attachment. [fol. 94] (State ex rel. Nauman v. Pondera Valley State Bank, 77 Mont. 1, 248 Pac. 207; Jenkins v. First National Bank, 73 Mont. 110, 236 Pac. 1085; State ex rel. Barnett v. Reynolds, 68 Mont. 572, 220 Pac. 525.)

Mieyr had the right at the time he attempted to secure the appointment of a receiver, to attach the property of the Federal Surety Company in the state of Montana, unless the appointment of a receiver in Iowa would prevent the exercise of that right.

Even though it be conceded that the appointment of the receiver in the state of Iowa operated to transfer the property of the defunct surety company to him, such involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment, where the rights of domestic creditors are involved, if the receiver has not obtained possession of the property and where the creditors have obtained rights or liens upon the property even after the appointment in the foreign jurisdiction.

In Pomeroy's Equitable Remedies, section 1674, page 3896, 4th ed., it is said:

"But where the receiver has not yet collected the fund or taken the property into his possession, and creditors or others have obtained rights or liens upon the property or fund in the state where it is situated, some distinctions must be observed. If the appointment of the receiver is involuntary, especially in aid of a statutory judicial proceeding, the prevailing doctrine seems to be that, where the rights of domestic creditors are involved, the assignment will not be recognized outside of the jurisdiction of appointment."

The following authorities support the text quoted: Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624, 43 L. Ed. 835, 19 Sup. Ct. Rep. 545; Cole v. Cunningham, 133 U. S. 107, 129, 33 L. Ed. 538, 10 Sup. Ct. Rep. 269; Catlin v. Wilcox Silver Plate Co., 123 Ind. 477, 18 Am. St. Rep. 338, 8 L. R. A. 62, 24 N. E. 250; Gray v. Covert, 25 Ind. App. 561, 81 Am. St. Rep. 117, 58 N. E. 731; Ward v. Continental [fol. 95] Pipe Co., 71 Conn. 345, 71 Am. St. Rep. 207, L. R. A. 706, 41 Atl. 1057; Gilbert v. Hewetson, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655.

When the transfer of a debtor's property is the result of a judicial proceeding, there is no provision of the Constitution which requires the courts of another state to carry it into effect, and as a general rule no state court will do this to the prejudice of the citizens of its own state. (Reynolds v. Adden, 136 U. S. 348, 34 L. Ed. 360, 10 Sup. Ct. Rep. 843; Zacher v. Fidelity Trust Co., 106 Fed. 593.)

The petition of Mieyr for the appointment of a receiver was insufficient, in that he, being a general creditor, had no right to the appointment of a receiver and had an adequate remedy by which he could be fully protected, namely, the issuance and levy of a writ of attachment.

The property of the Federal Surety Company within the state of Montana at the time of the levy of the execution by Williard et al., not being in possession of the Iowa receiver, was subject to levy, and the levy made under the execution in May, 1932, is good and valid.

The judgment and orders appealed from are reversed and the cause remanded for further proceedings in the district court in accordance with the views herein expressed.

Mr. Justice ANGSTMAN, dissenting:

I am unable to concur in the views of my associates. The majority opinion concedes that the Iowa decree worked a present dissolution of the surety company. With this I agree, and shall discuss the remaining questions on that basis.

The majority opinion, so far as it holds that whether an action may be commenced or continued against a foreign corporation after its dissolution by decree of the court of its domicile depends upon the laws of the state in which the action is pending, is in my opinion erroneous. I realize [fol. 96] that there is dictum in some cases sustaining that view, and that a limited few cases so hold. The overwhelming weight of authority and the better-reasoned cases hold that whether a dissolved corporation is continued in existence for the purpose of maintaining or defending actions for a personal judgment, must be determined by the laws of its domicile, and that laws of the forum continuing the life of a corporation will not be extended to a foreign corporation dissolved by the laws of its domicile. (8 Thompson on Corporations, sec. 6518, note 7; Marion Phosphate Co. v. Perry, 74 Fed. 425, 33 L. R. A. 252; Kinsler v. Casualty Co. of America (Neb.), 172 N. W. 33; Remington v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292; Fites v. National Life Assn. of Hartford, 130 Ala. 413, 30 So. 374; Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, 71 L. Ed. 634; Riddell v. Rochester German Ins. Co., 35 R. I. 45, 85 Atl. 273; Hunt v. Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592; Mattson v. Kennecott Mines Co., 101 Wash. 12, 171 Pac. 1040; Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257, affirmed in 187 Fed. 1005; Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850; Martyne v. American Union Fire Ins. Co., 216 N. Y. 183, 110 N. E. 502; Atlantic Dredging Co. - Beard, 130 N. Y. Supp. 4; Gulledge Bros. Lumber Co. v. Wenatchee Land Co., 115 Minn. 491, 132 N. W. 992.)

The laws of Iowa do not continue the life of a corporation dissolved by decree of court. (State of Iowa v. Fidelity Loan & Trust Co., 113 Iowa 439, 85 N. W. 638.) No personal judgment could be taken against the surety company after its dissolution. (MacRae v. Kansas Piano

Co., 69 Kan. 457, 77 Pac. 94; First National Bank of Selma v. Colby, 21 Wall. 609, 22 L. Ed. 687; Combes v. Milwaukee & M. R. Co. (Wis.), 62 N. W. 89, 27 L. R. A. 369; Venable v. Granite Co., 135 Ga. 508, 69 S. E. 822, 32 L. R. A. (n. s.) 446; Oklahoma National G[illegible] Co. v. Oklahoma, supra; Morgan v. New York B. & L. Assn. (Conn.), 46 Atl. 877; Grossman v. Vivienda Water Co. (Cal.), 89 Pac. 335; United States Trust Co. v. Pennsylvania Surety Co., 259 [fol. 97] Mich. 442, 243 N. W. 311.)

When a corporation is dissolved according to the laws of its domicile, it becomes a dissolved corporation everywhere, dead in every other state as well as in the state of its domicile, and an action against such foreign corporation abates on its dissolution. (8 Thompson on Corporations, 3d ed., sec. 6518; 8 Fletcher Cyc. Corporations, secs. 5810, 8582.) The decree of the Iowa court dissolving the surety company is entitled to full faith and credit in this state on that issue. (Cogliano v. Furgeson, 245 Mass. 364, 139 N. E. 527; Morgan v. New York B. & L. Assn., supra; United States Trust Co. v. Pennsylvania Surety Co., supra.)

While there is a diversity of views on the question, the better reasoned cases hold that a judgment obtained against a corporation after its dissolution is void and subject to collateral attack. (Grossman v. Vivienda Water Co., supra; Newhall v. Western Zinc Min. Co. (Cal.), 128 Pac. 1040; Panzee Hamilton Co. v. Bray (Cal.), 274 Pac. 769; Remington v. Samana Bay Co., supra; Garrett v. Pilgrim Mines Co., 47 Idaho 595, 277 Pac. 567; Marion Phosphate Co. v. Perry, supra; 8 Thompson on Corporations, 2d ed., sec. 6519; 8 Fletcher Cyc. Corporations, sec. 5811; 7 R. C. L. 739.)

And while there is authority to the contrary, the weight of authority supports the view that "if a corporation is dissolved pending an action against it, the action abates by operation of law without any plea in abatement, so that no valid judgment can be rendered for or against it, and the objection can be raised at any time." (1 C. J. 135, and cases cited, including that of Pendleton v. Russell, 144 U. S. 640, 36 L. Ed. 574, 12 Sup. Ct. Rep. 746.)

Section 6013, Revised Codes 1921, is relied upon in the majority opinion. It provides, in part, that the dissolution

of any corporation does not "take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred." Conceding for the purpose of this [fol. 98] discussion only, that the laws of Montana determine whether the action of appellants abated upon the dissolution of the company in Iowa, this section would be of no avail to them. Obviously it has application only to domestic corporations. It is only domestic corporations that may be dissolved by action taken under this and the preceding sections.

Section 6659 is also relied upon. It provides that "all foreign corporations licensed to do business in the state of Montana shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers." Its provisions, like those of section 6212, have no application to a corporation that has ceased to exist. (Robinson v. Mutual Reserve Life Ins. Co., 182 Fed. 850.) At most it is but a legislative declaration of the principle set forth in section 11 of Article XV of our Constitution. If section 6013 burdens a domestic corporation with life after its dissolution, the position of appellants in my opinion would not be affected by that fact. "The mere fact that a burden is placed upon domestic corporations from which foreign corporations are exempt does not operate to bring foreign corporations within the provisions of a law intended to apply solely to domestic corporations." (Uihlein v. Caplice Commercial Co., 39 Mont. 327, 102 Pac. 564.)

If there be merit in the claim that section 6013, when construed as applicable to domestic corporations only, has the effect of conferring greater rights and privileges upon foreign than upon domestic corporations, its utmost effect would be to condemn the statute as applied to domestic corporations, and this question could be raised only by a domestic corporation thus discriminated against. (Uihlein v. Caplice Commercial Co., supra.) But the effect of construing section 6013 as applicable only to domestic corporations does not give foreign corporations greater rights or privileges than domestic corporations. At most it [fol. 99] places creditors of a domestic corporation in a different position than creditors of a foreign corporation.

Its provisions measure the rights and privileges of creditors, and not the corporation itself.

I fail to see, however, wherein it can be said that even domestic creditors of the surety company because formed and dissolved under the laws of Iowa, are not enjoying the same rights and privileges as they would if the corporation had been created and dissolved under the laws of this state. Had it been created under the laws of Montana and here dissolved, the remedy preserved to a creditor by section 6013, and section 6659 would be nothing more than the right to proceed to judgment and have the judgment allowed as a claim in the receivership proceedings to share pro rata with other creditors. (8 Thompson on Corporations, sec. 6324, note 65; 53 C. J. 124; Richle v. Margolies, 279 U. S. 218, 73 L. Ed. 669; Martyne v. American Fire Ins. Co., 216 N. Y. 183, 110 N. E. 502.) That right is preserved to appellants here without the necessity of proceeding to judgment, and the dissolution in Iowa without continuance of the corporate life does not deprive them of any remedy which would be accorded to a creditor of a dissolved domestic corporation under like circumstances.

It is my opinion that the judgment of appellants is a nullity and, in consequence, that no lien was obtained by virtue of the levy of execution. But if the judgment of appellants be regarded as valid, I am still unable to subscribe to the conclusion announced in the majority opinion.

I think the court is in error in holding that an ancillary receiver may not be appointed at the instance of a general creditor. Our statute provides that a receiver may be appointed in an action "by a creditor to subject any property or fund to his claim, * * * where it is shown that the property or fund is in danger of being lost, removed, or materially injured." (Sec. 9301, Rev. Codes 1921.)

The complaint here is on behalf of all creditors, and [fol. 100] charges that the foreign receiver is removing the assets, and that unless a receiver be appointed, the funds would be dissipated and lost to the creditors.

We are here dealing with the appointment of an ancillary receiver in aid of the main receivership proceedings initiated in the Iowa courts. For the appointment of an ancillary receiver a creditor may make application. (53 C. J. 406; Popper v. Supreme Council etc., 70 N. Y. Supp. 637; Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E.

233, 1 A. L. R. 643; Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 N. E. 355.) "The better practice is for one who has an absolute right to sue in a foreign jurisdiction, such as a party to the original suit, or a creditor or a stockholder, to bring suit there, and ask for the appointment of an ancillary receiver." Clark on Receivers, sec. 318, subd. [a].) More particularly should this be the rule where, as here, the creditor, Mieyr, had confronting him the decree of the Iowa court adjudging that the corporation had been dissolved on September 21, 1931. This was sufficient basis upon which to justify the allegation made in his complaint that the property in this state was not subject to attachment or execution, dissolution has that effect, 8 Thompson on Corporations, sec. 6520), and to justify the court in assuming jurisdiction to appoint the ancillary receiver on his application.

Nor does the case of Scholefield v. Merrill Mortuaries, 93 Mont. —, 17 Pac. (2d) 1081, militate against this view. In that case there had been no dissolution of the corporation, and no primary receiver appointed for the purpose of winding up the affairs of the corporation preliminary to dissolution. The primary receivership proceedings there involved did not look to the dissolution of the corporation, but had the effect of hindering and delaying creditors of a going concern. The proceedings in this state in that case were, as this court stated, "purely a matter of the appointment of a receiver pendente lite."

[fol. 101] The fact that the assets had not yet come to the possession of the receiver when appellants made their levy, I think, is immaterial. The courts have the right to interfere summarily before property has passed to the possession of the receiver in order to aid the receiver in acquiring possession (53 C. J. 116). This is because the title of the receiver (8 Thompson on Corporations, sec. 6325) takes effect from the date of his appointment (Id., sec. 6326).

The trial court's function in a case of this kind was clearly expressed in Sands v. Greeley, 88 Fed. 132, 133, 31 C. C. A. 426, where the court said:

"When the administration extends over assets located in several jurisdictions, it is often convenient to apply, in advance, for the assistance of the different courts; hence the practice has become common of applying for auxiliary or ancillary appointments. When such an application is

made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly, in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state in the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case, and whether the proper administration of the assets requires the appointment of a receiver. Ordinarily, in comity to the proceeding of another court of co-ordinate jurisdiction, it will appoint an ancillary receiver, and assume administration in aid of the primary receiver (Trust Co. v. Miller, 33 N. J. Eq. 155). When it appoints a receiver, the officer becomes its officer, and is completely amenable to its control, and it matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is de- [fol. 102] rived from its decree, and does not depend upon comity. The assets are in its custody, and are to be disposed of as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. 'Where a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state' (Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464). It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver (United States v. Coxe, 18 How. 105, 15 L. Ed. 299). It is eminently proper that claimants residing within its jurisdiction should be relieved from the expense and inconvenience of proving their claims in other jurisdictions, and that provision should be made for securing to them equality of distribution in respect to the whole assets of the corporation; but there is no hard and fast rule to control the discretion of the court in making such distribution of the assets as shall be just to all creditors, and ultimately effect a ratable distribution of all the property of the corporation (Buswell v.

Supreme Sitting, 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; Baldwin v. Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739)."

Upon the appointment of the ancillary receiver the property was brought in the custody of the court and was not subject to execution (53 C. J. 131; 8 Thompson on Corporations, Ed. ed., sec. 6324). Nor does the fact that the court granted leave to make the levy alter the situation. That leave was granted only if Crichton's appointment should be revoked on appeal, and with the understanding that no preference over other creditors was given. The order granting leave was subsequently revoked.

The rule is that in the handling of the assets by the ancillary receiver "preference will be given to domestic credi- [fol. 103] tors in the court appointing the ancillary administrator if it appears that there is danger of discrimination against them in the forum of the original receivership, but only so far as is necessary to counteract such discrimination. A court in which ancillary receivership is pending will protect the rights of the citizens of its own state and those of other states having claims which ought in equity to be brought under its own protection, and it may direct final distribution of the assets in its hands, but where there are no rights entitled to the particular protection of the ancillary court, it ordinarily will direct its receiver to turn over to the primary or domiciliary receiver the assets or funds in its hands after proper expenses of receivership have been taken out, and such turning over of funds rests ordinarily within the discretion of the ancillary court" (Clerk on Receivers, sec. 321, and cases cited).

Here the decree complained of makes ample provision to guarantee the local creditors freedom from discrimination as against the foreign creditors and assures the local creditors their ratable share of their claims with others of equal rank, as shown by the facts stated in the majority opinion, and that is all they are entitled to receive. (Brunner v. York Bridge Co., 78 W. Va. 702, 90 S. E. 233, 1 A. L. R. 643.)

In my opinion the judgment of the learned trial judge was correct and should be affirmed.

Albert H. Angstman, Associate Justice.

[fol. 104] IN SUPREME COURT OF MONTANA

7074

JOHN MIEYR, Respondent,

v.

FEDERAL SURETY COMPANY OF DAVENPORT, IOWA, a Corporation, et al., Respondents; D. A. Crichton, Ancillary Receiver, Respondent; Harry P. Williard et al., Appellants

JUDGMENT ~~March 30, 1933~~ APR - 1 1933

This cause came on for decision and judgment. For reasons stated in the opinion, the judgment and orders appealed from are reversed, and the cause remanded for further proceedings in accordance with the views expressed in the opinion. Opinion Per Curiam, concurred in by Mr. Chief Justice Callaway and Justices Matthews, Stewart and Anderson. Mr. Justice Angstman filed a dissenting opinion.

There being no further matter presented the court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

[fol. 105] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER ON REHEARING ~~June 12, 1933~~ JUN 26 1933

This cause came on regularly for hearing, upon respondents' motion for a rehearing, M. S. Gunn, Esq., and Loy J. Molumby, Esq., appearing as counsel for the respondents, and H. Leonard DeKalb, Esq., and Louis P. Donovan, Esq., appearing for the appellants. After argument by respective counsel the matter was submitted for decision.

There being no further matter presented the court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

[fol. 106] IN SUPREME COURT OF MONTANA

[Title omitted]

JUL 19 1933

ORDER DENYING PETITIONER REHEARING ~~June 28, 1933~~

Respondents' motion for a rehearing is denied. Mr. Chief Justice Callaway and Mr. Justice Angstman, dissenting.

There being no further matter presented the court went into recess.

Lew. L. Callaway, Chief Justice.

Attest: J. W. Crosby, Clerk.

[fol. 107] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER STAYING REMITTITUR OR MANDATE—Filed July 31, 1933

It appearing that E. W. Clark, as Receiver, one of the respondents above named, intends to make application to the Supreme Court of the United States for a writ of certiorari for the purpose of bringing before said Court for review the judgment of the above-entitled court in the above-entitled cause, and that there is reasonable ground for said application, upon motion of Gunn, Rasch, Hall & Gunn, Attorneys for said E. W. Clark, as Receiver, it is Ordered that the remittitur or mandate in said cause shall not issue, but shall be stayed until the 15th day of September, 1933, and that if on or before said date there is filed with the Clerk of this Court an affidavit of one of the attorneys for said E. W. Clark, as Receiver, showing that such application by proper petition for writ of certiorari has been made in compliance with the rules of the Supreme Court of the United States, that the said remittitur or mandate shall be stayed for a further period thereafter, and shall not issue before final disposition shall be made by the Supreme Court of the United States of said application or petition.

The stay hereby granted is upon the condition that there

[fol. 108] be filed with the Clerk of this Court within 5 days from the date hereof a good and sufficient bond in the penal sum of $500.00, approved by one of the Justices of this Court, conditioned that if said application for such writ is not made on or before the 15th day of September, 1933, or if such application is not granted, or the said E. W. Clark, as Receiver, fails to make his plea good in the said Supreme Court of the United States, he will answer for all damages and costs which the appellants above named may sustain by reason of said stay.

Dated this 31st day of July, 1933.

Llewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana.

[fols. 109 & 110] Supersedeas bond for $500, approved and filed July 31, 1933, omitted in printing.

[fol. 111] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Montana is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4110)

FILE COPY

FILED
SEP 11 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK, AS RECEIVER, PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY, AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA AND BRIEF IN SUPPORT THEREOF.

M. S. GUNN,
Of Counsel,
Helena, Montana.

COOK & BALLUFF,
GUNN, RASCH, HALL & GUNN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK, AS RECEIVER, PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY, AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, RESPONDENTS.

SUMMARY OF PETITION AND BRIEF HEREWITH SUBMITTED.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The question raised is: What effect must be given by the courts of other States to statutory proceedings in the State of domicile for dissolution and liquidation of a corporation.

In a statutory proceeding by the Iowa Attorney General an Iowa court dissolved an Iowa insurance corporation and appointed the Iowa Insurance Commissioner to liquidate its business and affairs.

Thereafter a Montana court entered judgment against the corporation. Process issued under that judgment and was levied in Montana on property which had been owned by the corporation at the time of the statutory proceeding.

The Iowa Insurance Commissioner contended in the Montana courts:

1. That the Iowa statutes were part of the charter of the corporation;

2. That the statutory dissolution in Iowa terminated the corporate existence and transferred the corporate property to the Iowa Insurance Commissioner as trustee of an express trust for the benefit of creditors resident everywhere;

3. That the full faith and credit clause required the Montana courts to give that effect to the Iowa statutory proceeding;

4. That therefore the Montana judgment was against a non-existing defendant and void, and that the attempted levy was ineffectual as against the Iowa Insurance Commissioner.

The Montana Supreme Court held that, notwithstanding the dissolution in Iowa, the corporate existence was not terminated in Montana, that the judgment was valid, and that the property owned by the Surety Company in Montana was subject to execution thereunder.

If, as contended by petitioner, the question raised has been settled, then the decision of the Montana Court is contrary to the law as settled by this Court.

If the question raised has not been settled, it is of such importance as to merit consideration by this Honorable Court.

1. Because the rule announced by the Montana Court violates the Federal Constitution;

2. Because under modern business practice the rule announced by the Montana Court will result in serious confusion, and will result, as between creditors, in gross inequities, dependent largely upon accidents of geographical location of assets rather than upon sound application of rules of law or equity.

PETITION.

Your petitioner, E. W. Clark, as receiver, respectfully represents as follows:

The Federal Surety Company was prior to September 25, 1931, an Iowa Insurance corporation (R. 22). The District Court of Scott County, Iowa, on September 25, 1931, rendered a decree dissolving said corporation and appointing your petitioner, Commissioner of Insurance of the State of Iowa, receiver of its property (R. 21). Your petitioner duly qualified as such receiver (R. 31-32). On December 22, 1931, said court, by a further order or decree, adjudged and decreed that said corporation was dissolved and its corporate existence terminated on September 25, 1931, and that your petitioner "is the successor to said corporation, and as such holds title to all property owned by said company at the time it so ceased to exist" (R. 26).

The authority for the dissolution of the Federal Surety Company, the appointment of your petitioner as receiver, and vesting him with title to the property of said company, was conferred by certain sections of the Code of Iowa referred to and quoted at pages 17 and 18 of the Appendix hereto and in the decree of the Iowa court, of December 22, 1931 (R. 27).

On March 25, 1932, an action was commenced in the District Court of Cascade County, Montana, by one, John Mieyr, a general creditor of the Federal Surety Company, as plaintiff, against the said surety company and your petitioner for the purpose of securing the appointment of a receiver of the property of said company in Montana (R. 2). The laws of Iowa authorizing the appointment of your petitioner as receiver were pleaded, as was also the Iowa decree of September 25, 1931, appointing your petitioner receiver. On March 25, 1932, in the action so commenced, one D. A. Crichton, was appointed receiver of the property of said Surety Company in Montana (R. 8). Crichton as receiver duly qualified (R. 9-10).

At the time of the dissolution of the company and the appointment of your petitioner receiver by the Iowa Court, an action was pending in the District Court of Fergus County, Montana, in which respondents, Willard *et al.*, were plaintiffs, and the Federal Surety Company was defendant, to recover a money judgment. In said action, after the dissolution of the surety company by the decree of the Iowa court, and on May 20, 1932, judgment was rendered against said surety company for the sum of $14,968.90 and costs (R. 61). An execution was issued upon this judgment, and upon petition of respondents, judgment creditors, the District Court of Cascade County, in the action in which Crichton was appointed receiver on May 24, 1932, made an order granting permission to levy said execution upon the property of the surety company in Montana (R. 14). Your petitioner thereafter appeared in the action in which Crichton had been appointed receiver and filed his answer and cross-petition, praying for the appointment of said Crichton as ancillary receiver (R. 15). The plaintiff in the action answered, admitting the allegations of the cross-petition or complaint, and consented to

the appointment of Crichton as such ancillary receiver (R. 34). Thereupon an order was made confirming the appointment of Crichton as receiver, designating him as ancillary receiver, recognizing and confirming the title of your petitioner to the property of said surety company in Montana, and revoking the order of May 24, 1932, granting permission to Williard *et al.*, respondents, to levy execution upon the property of the surety company in Montana (R. 34-39). Respondents then made a motion to vacate and annul the order appointing Crichton ancillary receiver and revoking the order granting permission to levy execution upon the property of the surety company in Montana (R. 39).

Your petitioner filed objections to the granting of this motion upon the ground that to sustain same would deny full faith and credit to the judicial proceedings in Iowa, dissolving the Federal Surety Company, appointing your petitioner receiver, and vesting him with title to all of the property of said surety company wherever situated in violation of Section 1 of Article IV of the Constitution of the United States (R. 64-65).

The motion to vacate the order or decree appointing Crichton ancillary receiver and revoking the order granting permission to levy said execution was denied on August 31, 1932 (R. 66). An appeal was taken to the Supreme Court of Montana from the order denying said motion (R. 68-69).

In the opinion of the Supreme Court of the State of Montana on the appeal, it is said:

> "The appeal presents the question whether appellants have the right to be paid the amount of their claim from the Montana property before any part of such property is transmitted to the Iowa receiver for administration through the Iowa receivership,

when, as shown, their claim has been reduced to judgment and execution levied after the proceedings in the Iowa court designed to accomplish the dissolution of the corporation. Solution of the problem presented makes it necessary to determine the effect of the proceedings in the Iowa court upon the corporate life of the surety company" (R. 73-74).

"Conceding that the decree of the Iowa court resulted in a present dissolution of the surety company, the question arises: Did the action brought by the appellants abate?"

"Even though it be conceded that the appointment of the receiver in the State of Iowa operated to transfer the property of the defunct surety company to him, such involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment, where the rights of domestic creditors are involved, if the receiver has not obtained possession of the property and where the creditors have obtained rights or liens upon the property even after the appointment in the foreign jurisdiction" (R. 79).

"When the transfer of a debtor's property is the result of a judicial proceeding, there is no provision of the Constitution which requires the courts of another state to carry it into effect, and as a general rule no state court will do this to the prejudice of the citizens of its own state" (R. 80).

The Supreme Court of Montana decided that the action by Williard *et al.* against the Federal Surety Company did not abate by reason of the dissolution of the surety company by the Iowa court, that the judgment obtained by Williard *et al.* is a valid judgment (R. 77), and that the property of the surety company in Montana is subject to execution for the payment of this judgment (R. 80). The court further decided that Mieyr as a general creditor was not entitled to the appointment of a receiver of the Mon-

tana property as he had an adequate remedy at law by an attachment of the property of the surety company in Montana (R. 80). Judgment was rendered accordingly (R. 80).

Mr. Justice Angstman filed a dissenting opinion, in which it is said:

> "When a corporation is dissolved according to the laws of its domicile, it becomes a dissolved corporation everywhere, dead in every other state as well as in the state of its domicile, and an action against such foreign corporation abates on its dissolution. (Citing cases.) The decree of the Iowa court dissolving the surety company is entitled to full faith and credit in this state on that issue" (R. 82).

The Supreme Court of Iowa in the case of *State ex rel. Attorney General* v. *Fidelity Loan & Trust Company*, 113 Iowa 439, in speaking of a decree dissolving an Iowa corporation said:

> "The order of dissolution was as complete and final as it will be in a thousand years. The court was empowered by section 1640 of the Code to make it, and all have acquiesced in it as made. From the time of that entry the corporation has been dead, all its agencies ended, its employees, including attorneys, discharged; and it put, without exception or notice of appeal, beyond all future corporate activity. The effect was to 'put an end to its existence for all purposes whatsoever, and to destroy every one of its faculties, so that thereafter it can neither make nor take contracts, nor sue nor be sued, and so that all debts to or from it became extinguished, and all actions by and against it abated.' * * * To a corporation dissolution is as final as death to a person. It thereafter can have no interest in the property once by it controlled, or its disposition."

Your petitioner respectfully submits that by the decision and judgment of the Supreme Court of Montana full faith

and credit were not given to the laws of Iowa and the judicial proceedings authorized by said laws, dissolving the Federal Surety Company, appointing your petitioner receiver, and vesting him with title to all of the property of said company wherever situated.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Montana, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause in which said decision and judgment complained of was rendered, designated on its docket as cause numbered 7074, and that said decision and judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioner will ever pray.

E. W. CLARK,
Receiver,
By COOK & BALLUFF,
GUNN, RASCH, HALL & GUNN,
Counsel for Petitioner.

M. S. GUNN,
Of Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The opinion of the Supreme Court of the State of Montana has not yet appeared in print but will be found in the record on pages 69 to 87, inclusive.

Jurisdiction.

As appears from the petition, the ground upon which the issuance of a writ of certiorari is sought is that the Supreme Court of Montana by its decision and judgment failed to give full faith and credit to the statutes of Iowa and the judicial proceedings in that State, authorized by said statutes, dissolving the Federal Surety Company, appointing your petitioner receiver of, and vesting him with title to, all of the property of said company wherever situated, in violation of the full faith and credit clause of Section 1 of Article IV of the Constitution of the United States.

Judgment was rendered by the Supreme Court of Montana on April 1, 1933 (R. 88). A petition for rehearing was filed, and the cause was heard upon this petition on June 26, 1933 (R. 88), and the petition was denied July 19, 1933 (R. 89).

Jurisdiction to issue the writ is conferred by Subdivision b of Section 237 of the Judicial Code as amended by the Act of February 13, 1925.

Statement of Case.

By the decree of the Iowa court of December 22nd, 1931, it was adjudged and decreed: "That the defendant, Federal Surety Company, is and since September 25, 1931, has been dissolved and that its corporate existence is terminated," and that your petitioner "is the successor to said corporation and as such holds title to all property owned by Fed-

eral Surety Company at the time it so ceased to exist" (R. 30).

The decrees of the Iowa court were authorized by Sections 8402 and 9864 of the Code of Iowa of 1927 (pages 17 and 18, appendix hereto) and (R. 27-28). The Iowa court by the decree of September 25, 1931 (R. 30), found and determined that cause existed, which authorized the Attorney General of Iowa to make application for the dissolution of the Federal Surety Company and the appointment of a receiver as provided in the sections of the Iowa Code above referred to. Section 8964 authorizes the court upon such an application to "decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor" (pages 17 and 18, Appendix hereto) and (R. 28).

Chapter 233 of the Acts of the Forty-third General Assembly of Iowa provides that "The Commissioner of Insurance henceforth shall be the receiver and/or liquidating officer for any insurance company," etc. (page 18, Appendix hereto) and (R. 28).

By stipulation it was admitted by respondents that the statutes of Iowa are correctly pleaded (R. 65).

Error Relied Upon for Issuance of Writ.

The Supreme Court of Montana erred in failing and refusing to regard the dissolution of Federal Surety Company in Iowa as effective in Montana and in failing and refusing to regard your petitioner as successor to said company and the holder of title to all of the property of said company, thereby denying full faith and credit to the Iowa statutes and judicial proceedings in that State.

Argument and Authorities.

The effect of the Iowa statutes and the judicial proceedings in that State was to dissolve the Federal Surety Com-

pany and vest your petitioner as receiver with title to all of the property of said company.

State ex rel. Attorney General v. *Fidelity Loan & Trust Co.*, 113 Iowa 439.

In the case of *Roche* v. *McDonald*, 275 U. S. 449, the court said:

> "It is settled by repeated decisions of this court that the full faith and credit clause of the Constitution requires that the judgment of a state court which had jurisdiction of the parties and the subject-matter in suit, shall be given in the courts of every other state the same credit, validity and effect which it has in the state where it was rendered, and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that state can be relied on in the courts of any other state."

See also:

Hancock National Bank v. *Farnum*, 176 U. S. 640.

In the case of *Relfe* v. *Rundle*, 103 U. S. 222, this Court in the opinion said:

> "Relfe is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that state, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the state, and as such represents the state in its sovereignty while performing its public duties connected with the winding

up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the corporation itself for all the purposes of winding up its affairs. We are aware that, except by virtue of some statutory authority, an administrator appointed in one state cannot generally sue in another, and, that a receiver appointed by a state court has no extraterritorial power, but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the state which creates it may say who those agents shall be. One may be its representative when in active operation, and in full possession of all its powers, and another if it has forfeited its charter and has no lawful existence except to wind up its affairs. No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

In the case of *Converse* v. *Hamilton*, 224 U. S. 243, this Court considered the right of a receiver of a Minnesota corporation appointed by a court in that State to maintain an action in Wisconsin to enforce a stockholder's liability. In the opinion, it is said:

"But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere. So, when he invoked the aid of the Wisconsin court, the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce for the benefit of his *cestuis que trustant* a right of action, transitory in character, against one who was liable contractually and severally, if at all. The receiver's right to maintain the actions in that court was denied in the belief that it turned upon a question of comity only, unaffected by the full faith and credit clause of the Constitution of the United States, and this view of it was regarded as sustained by the decision of this court in *Finney* v. *Guy*, 189 U. S. 335, 47 L. Ed. 839, 23 Sup. Ct. Rep. 558. But that case is obviously distinguishable from those now before us."

In concluding the opinion, this Court said:

"In these circumstances we think the conclusion is unavoidable that the laws of Minnesota and the judicial proceedings in that state, upon which the receiver's title, authority, and right to relief were grounded, and by which the stockholders were bound, were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States."

See also:

Sterrett v. *Second National Bank*, 248 U. S. 73;
Bernheimer v. *Converse*, 206 U. S. 516;
Parsons v. *Charter Oak Life Ins. Co.*, 31 Fed. 305;
Lion Bonding & Surety Co v. *Karatz*, 280 Fed. 532;
Cogliano v. *Ferguson*, 139 N. E. (Mass.) 527;

Morgan v. *New York, etc. Assn.*, 46 Atl. (Conn.) 877;
Kinsler v. *Casualty Co. of America*, 172 N. W. (Neb.) 33;
Fletcher on Corporations, Permanent Ed., Vol. 17, p. 732.

The right to prosecute an action against a dissolved corporation is determined by the law of the State in which the corporation is created.

Oklahoma Natural Gas Co. v. *Oklahoma*, 273 U. S. 257.

In the opinion in the case just cited, this Court said:

> "It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect.' (Citing many cases.) It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. *The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being.*" (Italics ours.)

Conclusions.

The Supreme Court of Montana in deciding that the action prosecuted by the respondents against the Federal

Surety Company in the District Court of Fergus County, and in which judgment was recovered long after the dissolution of said company by the Iowa court pursuant to the statutes of that State, was not abated by such dissolution, denied full faith and credit to such statutes and judicial proceedings.

The Montana Supreme Court also failed to give full faith and credit to such statutes and judicial proceedings in deciding that the property of said surety company in Montana is subject to execution issued upon the judgment recovered by respondents, and subject to attachment to satisfy any claim of the plaintiff in the action in which Crichton was appointed ancillary receiver.

Respectfully submitted,

COOK & BALLUFF,
GUNN, RASCH, HALL & GUNN,
Counsel for Petitioner.

M. S. GUNN,
Of Counsel for Petitioner.

APPENDIX.

Statutes.

Judicial Code, Section 237, as Amended by Act of February 13, 1925.

(*a*) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

(*b*) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such

a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

(*c*) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: PROVIDED, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title.

Section 8402, *Code of Iowa,* 1927 *and* 1931, *Being Also Section* 1640 *of the Code of Iowa,* 1897.

Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the State of Iowa. An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them.

Section 8964, *Code of Iowa,* 1927 *and* 1931, *Being Also Section* 1731 *of the Code of Iowa,* 1897.

The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents, or stockholders of any insurance company doing business in the state, to examine into the affairs and condition of any such company incorporated or doing business therein, or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as

they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge.

Section 8613-c1, *Code of Iowa*, 1931, *Being Chapter* 233 *of the Acts of the* 43*rd General Assembly of Iowa.*

The commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership.

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JAN 8 1934
CHARLES ELMORE CROPLE
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK, AS RECEIVER,
PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,
AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, RESPONDENTS.

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK, AS RECEIVER,
PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,
AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, RESPONDENTS.

SUPPLEMENTAL BRIEF OF PETITIONER

NATURE OF THE CAUSE

This Court is asked to review a decision of the Montana Supreme Court reversing an order denying respondents the right to levy an execution under a judgment against an Iowa corporation which had been previously dissolved in a statutory liquidation proceeding in the state of its domicile.

This proceeding among other things presents the question what faith and credit the Montana courts must give to the Iowa statutes and to judicial proceedings in that state for the dissolution of the Iowa corporation against which the judgment was rendered.

OPINION OF THE STATE COURT

The opinion of the Montana Supreme Court has not been published in the official Montana Reports. It appears under the title of Mieyr v. Federal Surety Company, 23 Pac. (2d) 959, and at Pages 69 to 87 inclusive of the Record herein.

JURISDICTION

The grounds (failure to give full faith and credit to Iowa acts and decrees) on which the jurisdiction of this Court is invoked are set out at Page 9 of the brief in support of the petition for certiorari and in the petition, along with the other pertinent data with respect to jurisdiction.

Respondents' brief in resistance to the petition for certiorari treats at length with the subject of jurisdiction. For a concise answer to those contentions see statement of facts herein and brief point XI herein.

STATEMENT OF THE CASE

Federal Surety Company prior to September 25, 1931, was an Iowa insurance corporation (R. 22). The District Court, Scott County, Iowa, in a statutory proceeding by the Iowa Attorney General entered orders and decrees September 25, 1931, and December 22, 1931, dissolving said corporation and directing its liquidation by the Iowa Insurance Commissioner. See bill of complaint, Par. 6 (R. 5), Par. 10 (R. 6), admitted by petitioner's answer and cross-complaint (R. 15), to which are attached as exhibits copies of the two Iowa decrees (R. 21 and R. 26), stipulated to be true copies (R. 65). Petitioner qualified as receiver (R. 31). The authority for the decrees and the appointment and for the vesting of your petitioner with title to property of said corporation appears in certain sections of the Iowa Code, referred to and quoted in Appendix hereto and in the decree of the Iowa Court December 22, 1931 (R. 27).

Section 8402, Iowa Code, 1931, formerly Section 1640, Iowa Code, 1897, (Appendix hereto, and R. 27), provides that courts of equity shall have full power to dissolve a corporation and appoint a receiver therefor.

Section 8764, Iowa Code, 1931, formerly Section 1731, Iowa Code, 1897, (Appendix hereto, and R. 27-28), provides for an examination of an Iowa insurance corporation by the Insurance Commissioner and directs that if certain facts, including insufficiency of assets, are found by the Commissioner, that he shall communicate those facts to the Attorney General of Iowa, who shall commence a proceeding for the dissolution of the corporation and the winding up of its affairs. The court

is directed, in the event of certain findings, to decree a dissolution of the corporation and a distribution of its effects and to appoint a receiver.

Section 8613-c-1, Iowa Code, 1931, (Appendix hereto, and R. 28), directs that the Iowa Insurance Commissioner shall be the receiver for winding up an insurance company.

Approximately six months after the entry of the decree of dissolution in Iowa, an equity action was commenced in the District Court, Cascade County, Montana. One Mieyr, a creditor, was plaintiff. Federal Surety Company and the Iowa Insurance Commissioner were named as defendants. The aforesaid Iowa statutes and their effect in Iowa were pleaded in the bill of complaint. The Cascade County court in that action appointed a receiver for the Montana assets of the surety company (R. 8-10).

Thereafter, and in May, 1932, a money judgment was rendered in favor of respondents and against the surety company in a law action in Fergus County, Montana (R. 61). After they obtained their judgment respondents appeared in the equity action in Cascade County, Montana, and there asked and, with certain limitations, obtained leave of that court to levy execution under their judgment (R. 12-14). Thereafter petitioner appeared in the Cascade County equity action and filed his answer and cross-petition admitting certain allegations of Mieyr's complaint (R. 15), and asking for the entry of an order making the proceeding ancillary to and in aid of the liquidation proceeding in Iowa. The complainant, Mieyr, admitted the allegations of the answer and cross-petition (R. 34). The Cascade County court then entered an order (1) confirming the appointment of the receiver of the Montana assets, (2) providing for local proof of claims, (3) outlining procedure for certifying claims and transmitting assets to Iowa, and (4) revoking the previous order permitting the levy under respondents' Fergus County judgment (R. 34-39).

Thereafter respondents moved to set aside the portions of the Cascade County order referred to (R. 39). Petitioner filed a resistance to their motion upon the ground that to sustain that motion would deny full faith and credit to the Iowa statutes and to judicial proceedings in Iowa dissolving the surety company, appointing your petitioner receiver, and vesting him with title to all the property of the surety company (R. 64).

The Cascade County court upheld petitioner's contentions and overruled respondents' motion (R. 66). Respondents appealed (R. 68, 69). The Montana Supreme Court reversed the Cascade County court and in effect held that respondents' judgment was valid notwithstanding the dissolution of the surety company in the state of domicile, and in effect held that the title to the surety company assets had not passed to the Iowa Insurance Commissioner in such a manner as to prevent levy thereon in Montana. See opinion (R. 69 to 87).

Complete understanding of the points argued requires attention to the details of the proceedings.

The complaint in the Cascade County equity action quoted at length Section 8402, 8964 and 8613-c-1 of the Iowa Code (R. 4, 5), recited the entry of the Iowa decree, and in Paragraph 6 alleged:

> "That on or about the 25th day of September, 1931, in the District Court of the State of Iowa, in and for the County of Scott, in Equity Cause No. 28238, entitled 'State of Iowa, ex rel, John Fletcher, Attorney General, vs. Federal Surety Company, of Davenport, Iowa,' judgment was *duly given and made*" (our italics) "in said cause, dissolving said corporation and appointing one E. W. Clark Receiver and/or Liquidating Officer of said corporation, to take title to all property of the dissolved corporation for the purpose of liquidating its affairs and distributing its assets as by law provided."

Paragraph 10 of the complaint alleges:

> "That by the decree of the Court of Iowa above mentioned, said Federal Surety Company of Davenport, Iowa, has ceased to exist as a corporate entity, and its successor, the said E. W. Clark, Receiver of said Federal Surety Company of Davenport, Iowa, is beyond the jurisdiction of this Court."

Petitioner's answer and cross-complaint admits the above quoted allegations (R. 16), thereby adopting the allegations as to effect in Iowa of the Iowa decrees as well as the allegation that the Iowa decrees were *duly given and made* as required by the Montana statute. The exhibits thereto included the

Iowa decree of December 22, 1931 (admitted by Stipulation, R. 65), by which the Iowa trial court among other things determined:

> "That by virtue of the statutes hereinbefore referred to, as construed by the Court of last resort in the State of Iowa, and by virtue of the proceedings in this cause, the said corporation, Federal Surety Company, ceased to exist upon the entry of the Order and Decree herein at 4:30 P. M., Central Standard Time, September 25, 1931, and that thereupon all its agencies ended, its employees, including attorneys, were discharged, and it was put, *without exception or notice of appeal*" (our italics) "beyond all further corporate activity, its existence was put to an end for all purposes whatsoever, so that it can neither make nor take contracts, nor sue or be sued, and so that all debts to or from it became extinguished and all actions by or against it abated, and so that as after death of a natural person, it can have no interest in the property theretofore by it controlled." (R. 29)

Not only was the effect of the judgments and decrees in Iowa pleaded in the Montana trial court, but that court in fact determined and decided that question by the order entered August 25, 1932 (R. 34), in which it confirmed the appointment of the Montana receiver and made the receivership ancillary to the Iowa proceeding and in which it further found and determined that the Iowa court had dissolved the surety company and appointed the Iowa commissioner as receiver and in which the Montana trial court stated among other things:

> "That thereupon the corporate existence of Federal Surety Company terminated and title to all property theretofore owned by it passed to the Commissioner of the Department of Insurance of the State of Iowa in his capacity as Receiver and/or liquidating officer as aforesaid." (R. 35)

That same order revoked, annulled, and set aside the permission granted to respondents, permitting them to levy execution under the money judgment (R. 38, Par. 12).

In their motion respondents moved to strike out of the decree the following (among other things): "That thereupon the corporate existence of Federal Surety Company terminated, and

title to all property heretofore owned by it passed to the Commissioner of the Department of Insurance of the State of Iowa in his capacity as Receiver and/or liquidating officer as aforesaid." (R. 40, 41)

Thereby recognizing that the legal effect of the decree in Iowa had been pleaded and decided and pleading thereto.

Petitioner based his objections to the motion to vacate the order and decree "upon the grounds and for the reason that if said Motion is sustained it would, in violation of Section 1, Article IV of the Constitution of the United States, deny full faith and credit to the public acts, records and judicial proceedings of the State of Iowa, *made and entered*" (our italics) "in the District Court of the State of Iowa, in and for Scott County, a court of general jurisdiction, in the case entitled State of Iowa, ex rel. John Fletcher, Plaintiff, vs. Federal Surety Company of Davenport, Iowa, Defendant, being cause No. 28238 in equity, in which cause said Federal Surety Company by decrees of said court, *duly made and entered*" (our italics) "on September 25, 1931, and December 22, 1931, was dissolved and E. W. Clark, Commissioner of Insurance of the State of Iowa, was then duly appointed statutory receiver and/or liquidating officer of said Federal Surety Company, and vesting in him title to all property of said Federal Surety Company wherever situated, all of which is more fully shown in the duly exemplified copies of said decrees attached to and made a part of the answer and cross-petition of E. W. Clark as Receiver and/or Liquidating Officer of the Federal Surety Company of Davenport, Iowa, filed in this action pending in the District Court of Cascade County, Montana, on the 25th day of August, 1932, to which decrees reference is hereby made." (R. 64)

It was then stipulated that the statutory provisions of the State of Iowa set forth in the complaint and in the cross-complaint are therein correctly set forth and that copies of the judgments and orders attached to the cross-complaint were true and correct copies of the original judgment and orders given and made in the Iowa court (R. 65).

The Cascade County court overruled respondents' motion (R. 66). Respondents appealed (R. 68). The Montana Supreme Court reversed the Cascade County trial court (R. 69-87). In its opinion reversing the trial court the Montana court

considered two propositions: (1) Whether respondents' law action in Fergus County, Montana, had abated upon the dissolution of the defendant surety company in Iowa (R. 75); and (2) whether the title to the assets had passed to the Iowa Commissioner upon entry of the Iowa decree (R. 79). The Montana Supreme Court opinion conceded for the purposes of the opinion that the Iowa decree resulted in a present dissolution of the surety company and then proceeded to consider the questions whether respondents' law action abated and whether the title passed to the Iowa Commissioner.

The opinion then holds that respondents' law action did not abate upon the dissolution in Iowa (R. 77, last par.).

The opinion then proceeds to consider the question whether title passed to the Iowa Insurance Commissioner and holds that even though the appointment in Iowa operated to transfer the property, such involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment, where the rights of domestic creditors are involved (R. 79, last par.).

The opinion concludes (R. 80) with the statement:

> "The property of the Federal Surety Company within the state of Montana at the time of the levy of the execution by Williard et al., not being in possession of the Iowa receiver, was subject to levy, and the levy made under the execution in May, 1932, is good and valid."

Petitioner then asked this Court to review the action of the Montana Supreme Court and assigned the following errors (Petition For Certiorari and Brief, p. 10), which will be fully argued herein:

"ERROR RELIED UPON.

"The Supreme Court of Montana erred in failing and refusing to regard the dissolution of Federal Surety Company in Iowa as effective in Montana and in failing and refusing to regard your petitioner as successor to said company and the holder of title to all of the property of said company, thereby denying full faith and credit to the Iowa statutes and judicial proceedings in that State."

SUMMARY OF FACTS AND ARGUMENT

Pursuant to an Iowa statute action was commenced by the Attorney General against the Iowa corporation, and decrees were entered dissolving the corporation and appointing the Iowa Insurance Commissioner as Receiver.

Thereafter respondents obtained a money judgment in Montana against *the corporation* and levied execution in Montana on property owned by the corporation at the time of dissolution.

The record raises the questions that the full faith and credit clause of the Federal Constitution required the Montana court to give effect to the Iowa statutes and decrees and to determine that the corporate existence had terminated; that respondents' law action had abated; that the title to the assets had passed to the Iowa Insurance Commissioner as trustee for creditors; and that the entry of the money judgment against the corporation and the levy attempted thereunder were ineffectual as against the Iowa Commissioner as such trustee.

The Montana court held that notwithstanding dissolution in Iowa the corporate existence was continued in Montana; that respondents' law action did not abate; that title to the assets had not passed to the Iowa Commissioner so as to prevent levy; and that the judgment against *the corporation* and the levy thereunder were effectual as against the Iowa Commissioner.

The Iowa statute was part of the corporate charter. The statute limited the corporate life and specified the distribution of its effects upon dissolution. Admission to Montana as a foreign corporation did not give the surety company added vitality. It was there admitted subject to its charter provisions, which were recognized by all who dealt with it, including the State of Montana.

The dissolution was final. Corporate existence was not continued for any purpose. Actions against the corporation abated. Judgment could not thereafter be rendered against it any more effectually than against a dead man. Montana could not continue the existence of the corporation any more effectually than it could continue the life of a human being deceased. This result is not procedural or controlled by the law of Montana, but concerns the fundamental law of the corporation enacted

by the state which brought the corporation into being. Respondents' law action having abated could not proceed unless possibly by revivor, which was not resorted to.

The Iowa statute directed distribution of assets to creditors and for that purpose designated the Iowa Insurance Commissioner as Receiver. As such he became trustee of an express trust and took, at least by implication, title sufficient to carry out the trust.

By holding that the corporate existence continued and that title did not pass, the Montana court denied full faith and credit to the Iowa acts and decrees. That denial was not avoided by relying on a Montana statute. Denial by virtue of a Montana statute was denial nevertheless and offends the full faith and credit clause as would denial on any other ground. The Iowa statute, as put into effect by the Iowa decrees, must be given effect even though repugnant to a Montana statute.

Title to the assets having passed, and respondents' law action having abated, the judgment rendered against *the corporation* and the levy attempted thereunder were ineffectual as against the Iowa Commissioner as trustee for all creditors.

The dissolution and transfer of title are said by the Montana court to be in invitum and therefore need not be recognized. The decree in Iowa merely put the statutory charter provision into effect. It is that statutory charter provision which must be given full faith and credit in Montana and not alone the decree.

Respondents contend the Iowa court decreed the corporation *shall* be dissolved and therefore did not effect present dissolution. The word "shall" must be read with the context of the Iowa decree, which is that the corporation shall be dissolved *in accordance with the Iowa statute* which specified present dissolution. The present tense should therefore be accorded to the word "shall." In any event, that question was settled by supplemental decree entered before respondents' judgment.

Respondents contend that the Iowa court did not have jurisdiction of the corporation when it entered its decree. The Iowa court did have jurisdiction. Its jurisdiction was not acquired pursuant to ordinary procedural statutes but according to and

in exact compliance with a statutory provision of the corporate charter.

Respondents contend that the Iowa statute did not by express words vest title in the Iowa Commissioner. The statute nevertheless imposed upon him a trust for benefit of creditors, and under the law of trusts he acquired by implication sufficient title to carry out that trust. The implication is necessary, otherwise under common law the assets reverted or escheated contrary to the intent of the statute.

Respondents contend that the entry of the Iowa decrees and their effect in Iowa were not pleaded. See foregoing Statement of Facts, Brief Point XI, and argument thereunder. The entry and effect of the Iowa decrees were pleaded several times and were adjudicated by the very decree which respondents attack by motion.

Petitioner's constitutional assertions were duly and adequately set up in the objections to respondents' motion (R. 64).

The purpose of the Iowa statute is clear, to-wit, present dissolution and ratable distribution irrespective of geographical location of assets and irrespective of residence. That purpose should be carried out, and all reasonable implications essential to that end should be indulged in.

To uphold petitioner's contentions it is unnecessary to indulge in any implications unless possibly with respect to interpreting the word "shall" and accompanying context as used in the Iowa decree and with respect to implying transfer of title sufficient to carry out the trust imposed on the Iowa Insurance Commissioner. Neither is strained. Both are clearly called for by the record.

With those implications made, it becomes clear that the surety company was finally dissolved; that title passed to the Iowa Commissioner for the benefit of all creditors; that the State of Montana is powerless to alter the effects of those charter provisions; that respondents' judgment and levy were ineffectual against the Iowa Commissioner as such trustee; and that the Montana decision, having failed to give such effect to the Iowa decrees and statutory charter provisions, should be reversed.

POINTS OF LAW RELIED UPON

I.

Statutes of the state creating a corporation, providing for its dissolution and liquidation, are part of its charter, which is the law of the corporate existence.

Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337;

Kinsler v. Casualty Co. of America, 103 Neb. 382, 172 N. W. 33.

II.

The decrees of the Iowa court finally dissolved Federal Surety Company. Thereafter it had no existence.

Sec. 8402, Iowa Code 1931, being Sec. 1640, Iowa Code 1897;

Sec. 8964, Iowa Code 1931, being Sec. 1731, Iowa Code 1897;

Sec. 8613-c-1, Iowa Code 1931, being Chap. 233, Acts 43d General Assembly of Iowa;

State of Iowa v. Fidelity Loan & Trust Co., 113 Ia. 439, 85 N. W. 638.

III.

No state save that creating a corporation has power to keep it alive or to modify its charter.

National Surety Co. vs. Cobb, 66 Fed. (2d) 323 (C. C. A. 5);

Remington v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292;

Marion Phosphate Co. v. Perry, 74 Fed. 425;

Fitts v. National Life Assn. of Hartford, 130 Ala. 413, 30 S. 374;

Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, 71 L. Ed. 634;

Riddell v. Rochester German Ins. Co., 35 R. I. 45; 85 Atl. 273;

Gulledge Bros. L. Co. v. Wenatchee Land Co., 115 Minn. 488, 132 N. W. 992;

1 Thompson on Corp. (3d Ed.), Sec. 40;

Morgan v. New York Nat. Bldg. & Loan Assn., 73 Conn. 151, 46 Atl. 877.

IV.

No personal judgment can be rendered against a dissolved corporation. Pending actions against it abate.

MacRae v. Kansas Piano Co., 69 Kan. 457, 77 Pac. 94;

First National Bank of Selma v. Colby, 21 Wall. 609, 22 L. Ed. 687;

Combes v. Milwaukee & M. R. Co., 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369;

Mumma v. Potomac Co., 8 Pet. 284, 8 L. Ed. 945;

Marion Phosphate Co. v. Perry, 74 Fed. 425;

Venable v. Granite Co., 135 Ga. 508, 69 S. E. 822; 32 L. R. A. ns 446;

Oklahoma Natural Gas Co. v. State of Oklahoma, 273 U. S. 257, 71 L. Ed. 634;

Pendleton v. Russell, 144 U. S. 640, 36 L. Ed. 574.

V.

The Iowa statutes and decrees finally dissolving the Iowa corporation and vesting title in the liquidator are entitled to full faith and credit in Montana under Section 1, Article IV, of the Constitution of the United States.

Roche v. McDonald, 275 U. S. 449, 72 L. Ed. 365;

Cogliano v. Ferguson, 245 Mass. 364, 139 N. E. 527;

Morgan v. N. Y. Nat. Bldg. & Loan Assn., 73 Conn. 151, 46 Atl. 877;

Converse v. Hamilton, 224 U. S. 243, 56 L. Ed. 749;

Hancock National Bank v. Farnum, 176 U. S. 640; 44 L. Ed. 619.

VI.

The Iowa decree of September 25, 1931, effected a present dissolution of Federal Surety Company. If not, the decree of December 22, 1931, certainly did so.

57 C. J. 545, Sec. 2;

U. S. v. Percheman, 7 Pet. 51, 8 L. Ed. 604, 618;

Viterbo v. Friedlander, 120 U. S. 707, 30 L. Ed. 766;

U. S. v. Wiggins, 14 Pet. 334, 349; 10 L. Ed. 481;

Rutherford v. Greene's Heirs, 15 U. S. 196, 4 L. Ed. 218.

VII.

Petitioner, the Insurance Commissioner of Iowa, took and holds title to the corporate property by virtue of the Iowa statutes which are part of the corporate charter, and not in invitum by the court's decree. The decree simply put the statutes into operation.

Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337;

Kinsler v. Casualty Co. of America, 103 Neb. 382, 172 N. W. 33;

Martyne v. Am. Union F. Ins. Co., 216 N. Y. 183, 110 N. E. 502.

VIII.

Under the Iowa statutes title to the corporate property is vested in the Iowa Commissioner of Insurance, by operation of law, though there are no express words of transfer in the statutes, otherwise it must escheat to the State.

1 Perry on Trusts (6th Ed.), Secs. 313, 314, 315;

Bernheimer v. Converse, 206 U. S. 516, 525, 534; 51 L. Ed. 1164;

Converse v. Hamilton, 224 U. S. 245, 255, 257; 56 L. Ed. 749;

Converse v. Mears, 162 Fed. 767, 769;

Parker v. Stoughton Mills Co., 91 Wis. 174, 64 N. W. 751;

Howarth v. Lombard, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888;

Bullock v. Oliver, 155 Ga. 151, 116 S. E. 293;

10 R. C. L., p. 605, Sec. 4.

IX.

It was not necessary for petitioner to plead that time for appeal from the Iowa decree had expired.

(a) The Iowa decree of December 22, 1931, finds that Federal Surety Company was by the decree of September 25, 1931, "put, without exception or notice of appeal, beyond all further corporate activity" (R. 29).

(b) In pleading a foreign judgment it is not necessary to allege that there is no appeal pending or that the time for appeal has expired. These are matters of defense according to all the authorities.

A. Coolot Co. v. Kahner & Co., 140 Fed. 836;

Dow v. Blake, 148 Ill. 76, 35 N. E. 761;

Birney v. Birney, 111 N. J. Eq. 37, 161 Atl. 50;

Taylor v. Shew, 39 Cal. 536;

Fredericks v. Clark, 3 Mont. 258.

X.

The order to show cause why "its business should not be forthwith dissolved," served on Federal Surety Company, gave the Iowa court jurisdiction to enter a decree of dissolution because the Iowa statute, which was part of its charter, so provides.

Sec. 8964, Iowa Codes of 1927 and 1931, being Sec. 1731 Iowa Code 1897;

Bouree v. Trust Francais etc. Co., 14 Del. Ch. 332; 127 Atl. 56, 61.

XI.

The questions for review by this Court were properly preserved in the Montana courts.

(a) Petitioner set up the title, right, privilege, or immunity claimed by him under the Constitution.

(b) The effect of the decrees and statutes of Iowa was pleaded and proved.

(c) The entry of the orders and decrees in Iowa was properly pleaded.

XII.

The title which enables a liquidator to sue for property in another state necessarily precludes any other from suing for it. The charter provisions, in the form of statutes providing for dissolution and liquidation, are implied terms of every contract which the corporation makes with its creditors. This precludes the creditor from in any manner interfering with the liquidator's control of the corporate property wherever situated.

Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337;

Cogliano v. Ferguson, 245 Mass. 364, 139 N. E. 527;

Mumma v. Potomac Co., 8 Pet. 284, 8 L. Ed. 945.

ARGUMENT

I.

Statutes of the state creating a corporation, providing for its dissolution and liquidation, are part of its charter, which is the law of the corporate existence.

The principle that statutes of the state of domicile are part of the corporate charter is at the very root of the rules governing this case. From it flow consequences that the Montana

Supreme Court entirely overlooked or refused to recognize, although they are pointed out in the dissenting opinion concurred in by two of the five Justices of that court.

In the leading case of *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337, this Court said that the Missouri Insurance Superintendent, designated by statute to liquidate a dissolved insurance corporation, was not an officer of the court which dissolved the corporation but was a statutory trustee for creditors and stockholders. This Court held that the law which clothed the Missouri Insurance Superintendent with the trust was in legal effect part of the charter of the corporation. In so holding the Court used the following language:

> "Relfe is not an officer of the Missouri State Court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation."
>
> "Every corporation necessarily carries its charter wherever it goes, *for that is the law of its existence.*" (our italics) "It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

In *Kinsler v. Casualty Co. of America*, 103 Neb. 382; 172 N. W. 33, a New York corporation was permitted to do business in Nebraska and thereafter was dissolved in a New York statutory liquidation proceeding. Its property was attached in Nebraska. The New York Insurance Superintendent intervened. The Nebraska court dissolved the attachment. The court referred to the desirability of preventing removal of property from the state and referred to the proposition that Nebraska need not have admitted the New York corporation. The decision then squarely recognizes that the New York corporation once admitted brought with it all its charter provisions, including the New York statutes relative to liquidation. The

following language appears in the opinion:

> " * * * but foreign corporations came here with their charters limited, checked, and hemmed in by a foreign statute, the statute of their home state, and when this state admitted a corporation under these conditions and specific provisions, it is bound by it, and has entered into solemn contract to recognize the powers therein conveyed."

II.

The decrees of the Iowa court finally dissolved Federal Surety Company. Thereafter it had no existence.

Sec. 8402, Iowa Code 1931, being Sec. 1640, Iowa Code 1897 (appendix hereto, and R. 27), provides:

> "Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the State of Iowa."

Sec. 8964, Iowa Code 1931, being Sec. 1731, Iowa Code 1897 (appendix hereto, and R. 27-28), provides for an examination of any insurance company doing business in the state; provides if certain facts are found:

> "he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor."

Sec. 8613-c-1, Iowa Code 1931, being Chapter 233, Acts 43d General Assembly of Iowa (appendix hereto, and R. 28), provides:

"The commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier."

The court of last resort in the State of Iowa has held that the existence of a corporation dissolved by decree pursuant to statute terminates on entry of the decree; that the corporation does not continue in existence for any purpose. The court held that only corporations whose charters expire by limitation or the voluntary act of the stockholders continue their existence for the purpose of winding up their affairs. The court squarely holds that a statute continuing corporate existence for the purpose of winding up its affairs does not apply to dissolution by court decree pursuant to statute because there is ample provision through the appointment of a receiver or trustee for winding up the affairs of the corporation and for the protection of creditors and stockholders. The court held that the effect of the decree was to put an end to the corporate existence for all purposes whatsoever and to destroy every one of its faculties, so that thereafter it could neither make nor take contracts, nor sue nor be sued.

The Iowa Supreme Court so held in the case of *State of Iowa v. Fidelity Loan & Trust Co.*, 113 Iowa 439, 85 N. W. 638, wherein the court among other things says:

"It is only the corporations whose charters expire by limitation or the voluntary act of the stockholders which continue for the purpose of winding up their affairs."

We therefore start with the proposition that the dissolution of Federal Surety Company became final upon the entry of the decree September 25, 1931. It did not survive for any purpose.

III.

No state save that creating a corporation has power to keep it alive or to modify its charter.

Federal Surety Company derived its existence from Iowa statutes. Its admission to another state gave it no new vitality. The sovereignty which creates a corporation has exclusive power over its existence.

Dissolution of a corporation in the state of domicile is to it as death to a human being. Thereafter, unless the corporate existence is continued by laws of the domicile, it has no existence for any purpose either within or beyond the state of domicile. At common law, for example, dissolution abated all litigation in which the corporation appeared either as plaintiff or defendant and that is still the law except as changed by statute of the creating state.

In *National Surety vs. Cobb*, 66 Fed. (2d) 323 (C. C. A. 5), the court says that the case:

> " * * * presents the seriously substantial point that when a corporation has been, pursuant to the statutes of the state of its incorporation, dissolved by a court of competent jurisdiction in that state, it is, *unless the statutes of that state continue its corporate life*" (our italics) "for the purposes of suit, civilly dead, and no action can be thereafter maintained against it anywhere."

The court in that decision held that judgment against a dissolved New York corporation was a nullity. Petition for writ of certiorari was denied November 13, 1933.

The Massachusetts Supreme Court in *Remington v. Samana Bay Co.*, 140 Mass. 494, 5 N. E. 292, held that a corporation formed by a foreign government and later dissolved by that foreign government could not be kept alive in the United States, and in so holding used the following language:

> "It is true that the existence of a corporation is a fiction, but the very meaning of that fiction is that the liability of its members shall be determined as if the fiction were the truth. That fiction or artificial creation is *wholly within the power of its creator*," (our italics) "and persons who deal with it must be taken to understand that it is so."

In *Marion Phosphate Co. v. Perry*, 74 Fed. 425, 428 (C. C. A. 5), it was contended that a Florida statute kept a dissolved Georgia corporation alive. The Circuit Court for the Fifth Circuit held that the dissolution in Georgia put an end to the corporate existence everywhere and that dissolution of the corporation could not be affected by the laws of Florida. The court used the following language:

"The Chatham Investment Company, incorporated under the laws of the State of Georgia, when dissolved according to those laws, became a dissolved corporation everywhere,—dead in Florida as well as Georgia."

In *Fitts v. National Life Assn. of Hartford*, 130 Ala. 413, 30 S. 374, the court held that an Alabama statute continuing corporate existence for five years after dissolution had no application to a foreign corporation and that for their existence in Alabama foreign corporations depended solely on the laws of the state of their creation. The court uses the following language:

"Our statute providing for the continued existence of dissolved corporations for five years for the purpose of prosecuting or defending suits, etc., has no application to foreign corporations. *For existence here they depend solely on the state of their creation.*" (our italics)

In *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257, 71 L. Ed. 634, Chief Justice Taft stated that dissolution of a corporation at common law abated all litigation and that in order that the corporate existence might continue even only for litigating purposes there must be some statutory authority in the state of domicile for the prolongation, and then continues:

"The matter is really not procedural or controlled by the rules of the court in which the litigation pends. *It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being.*" (our italics)

In *Riddell v. Rochester German Ins. Co.*, 35 R. I. 45; 85 Atl. 273, 275, the Rhode Island court held that an action against a New York corporation, subsequently dissolved, had not abated, but based its holding entirely upon the proposition that the New York law continued the existence of the corporation. The court says:

"We agree with the contention of the defendant that Section 9, c. 213 of our General Laws, has no application to the present case. The right to maintain this action unabated

does not, and cannot, come from any legislation in our own state, but such right must be found in the charter of these insurance companies or in the laws of the state of New York." (our italics)

In *Gulledge Bros. Lbr. Co. v. Wenatchee Land Co.,* 115 Minn. 488, 132 N. W. 992, the Minnesota court, in dealing with a dissolved Washington corporation, held that the Minnesota statute continuing corporations for a definite period after dissolution had no application and that the existence of the corporation depended entirely on the law of Washington, which provided that upon dissolution a Washington corporation ceased to exist for any purpose. The court says:

"The situation and rights of all parties, stockholders and creditors, as respects the winding up of the affairs of the corporation, are governed by the laws of Washington, and not by the laws of this state."

In *1 Thompson on Corp. (3d Ed.),* Sec. 40, the statement is made that a corporation can only be created and exist by sanction of the legislature.

The proposition here contended for is succinctly stated by the Connecticut court in *Morgan v. New York Nat. Bldg. & Loan Assn.,* 73 Conn. 151, 46 Atl. 877, as follows:

"The capacity of suing and being sued is possessed by corporations only by law; by foreign corporations, only because of their existence by force of foreign law. If there is no such law, there is no such capacity. The state which grants a corporate franchise has exclusive and supreme power to withdraw it, whatever may be the effect of its so doing on property rights which may have been acquired under the laws of other governments."

Generally speaking, it is clear that an Iowa corporation can exist only by virtue of Iowa statutes. Can it be that the State of Iowa, creator of a corporation, can withdraw life from it only by consent of the remaining forty-seven states of the Union? This is the result if any other state can keep it alive after the State of Iowa has finally dissolved it.

IV.

No personal judgment can be rendered against a dissolved corporation. Pending actions against it abate.

We are not considering the question whether a state may enact statutes of survival and revivor of suits against foreign corporations finally dissolved.

In this case the Montana courts have not proceeded by revivor against the successor or representative, but, refusing to recognize the dissolution of the Iowa corporation, have attempted to render judgment against the dissolved corporation itself.

Dissolution, as the death of an individual, terminates all corporate powers and functions.

In *MacRae v. Kansas Piano Co.*, 69 Kan. 457, 77 Pac. 94, it is said:

> "At the common law this termination of corporate powers became so radical that a corporate debtor was entirely discharged of its obligation, and all actions by or against it were at once and forever abated; not even an execution on a judgment theretofore obtained could issue."

In *First National Bank of Selma v. Colby*, 21 Wall. 609; 22 L. Ed. 687, this Court held that judgment could no more be rendered against a dissolved corporation than against a man dying pendente lite. The court says:

> "With the forfeiture of its rights, privileges and franchises the corporation was necessarily dissolved, as the decree adjudged. Its existence as a legal entity was thereupon ended; it was then a defunct institution, and judgment could no more be rendered against it *in a suit previously commenced* (our italics) "than judgment could be rendered against a dead man dying pendente lite. This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose

as much requires special legislative enactment as does the original creation of the corporation."

To the same effect see *Combes v. Milwaukee & M. R. Co.*, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369.

Mumma v. Potomac Co., 8 Pet. 284, 8 L. Ed. 945, was a case where a judgment was entered against defendant corporation in June, 1818. No further proceedings were had until April, 1828, when a scire facias was issued to revive the judgment. Meantime the corporation had been finally dissolved. This Court, speaking through Mr. Justice Story, says:

"A corporation, by the very terms and nature of its political existence, is subject to a dissolution by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy, and the nature and objects of its charter."

"There is no pretense to say that a scire facias can be maintained and a judgment had thereon against a dead corporation any more than against a dead man."

In *Marion Phosphate Co. v. Perry* (C. C. A. 5), 74 Fed. 425, the Court says:

"That a dissolution of a corporation abates all suits against it is familiar law of the text-books. Mor. Priv. Corp., Sec. 1031, thus declares: 'The dissolution of a corporation, at common law, not only means that the company has lost its franchises, and can no longer act in a corporate capacity, but it implies that the corporation has wholly ceased to exist in legal contemplation, and will not be recognized as a corporate body for any purpose. It follows that suits brought by or against a corporation are abated by its dissolution, and a judgment purporting to be rendered against a corporation which is not in existence is a nullity.' Any number of cases can be cited to support the text." (citing cases)

In *Venable v. Granite Co.*, 135 Ga. 508, 69 S. E. 822; 32 L. R. A. ns 446, the Supreme Court of Georgia says:

> "A corporation is an artificial person, created by law for specific purposes, the limit of whose existence, powers, and liberties is fixed by its charter. * * * When a corporation expires by limitation of time, it can no longer prosecute or defend an action, in the absence of some saving provision *in its governing statute.*" (our italics)

In *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U. S. 257, 71 L. Ed. 634, this Court, speaking through Mr. Chief Justice Taft, said:

> "It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation pro hac vice."

Pendleton v. Russell, 144 U. S. 640, 36 L. Ed. 574, is very much in point. Suit was brought in Tennessee against a New York insurance company and transferred to the United States Circuit Court and judgment for plaintiff rendered.

On writ of error to this Court the Circuit Court was reversed. While the cause was pending in this Court the corporation was dissolved in New York at the suit of the Attorney General. Thereafter the Circuit Court entered judgment by default against the insurance company. This judgment was filed as a claim in New York against the receiver, and judgment was finally entered in the Supreme Court of New York disallowing the claim. The cause was then brought to this Court on writ of error.

Speaking through Mr. Justice Field, this Court said:

> "The judgment was therefore no more valid against a non-existing corporation than it would have been if rendered for a like amount against a dead man. The receiver was not substituted in the place of the dissolved corporation; no process or citation was issued by that Court to bring him

before it, or any proceeding taken for that purpose. Nor would such a proceeding have had any effect, for, the corporation having expired, the suit itself had abated. It ceased to be a pending suit."

"In the condition in which the case in the Circuit Court of the United States was left after the reversal of its judgment, it had no jurisdiction to proceed with the action beyond entering the order under the mandate of this Court. The subsequent trial and judgment were but proceedings against a corporation which had no existence, and vitality could not be given by them to the artificial body which had become extinct."

Under any other doctrine the existence of a private contract might force perpetuity of existence on a corporation contrary to public policy and contrary to the nature and objects of its charter. To allow actions to continue against a corporation finally dissolved would be to continue the existence of the corporation pro hac vice.

V.

The Iowa statutes and decrees finally dissolving the Iowa corporation and vesting title in the liquidator are entitled to full faith and credit in Montana under Section 1, Article IV, of the Constitution of the United States.

In resistance to our petition for writ of certiorari counsel for respondents argues that the Supreme Court of Montana bases its decisions upon the interpretation of a Montana statute, and as we have not attacked the validity of the statute, as repugnant to the Federal Constitution we present nothing for review in this Court.

Denial of full faith and credit by virtue of a statutory or constitutional provision offends against Section 1, Article IV, of the Federal Constitution, as would a denial on any other ground.

This Court has so held in *Roche v. McDonald*, 275 U. S. 449, 72 L. Ed: 365, wherein reference is made to the requirement that a state court judgment must in other courts be given the same credit, validity and effect it has in the state where rendered, and wherein it is stated:

"* * * This rule is applicable where a judgment in one state is based upon a cause of action which arose in the state in which it is sought to be enforced, as well as in other cases; and the judgment, if valid where rendered, must be enforced in such other state, *although repugnant to its own statutes.*" (our italics)

The Massachusetts court in *Cogliano v. Ferguson*, 245 Mass. 364, 139 N. E. 527, held that a New York decree dissolving a New York corporation and vesting the New York Superintendent with title to the assets was entitled to full faith and credit in Massachusetts.

In *Morgan v. New York Nat. Bldg. & Loan Assn.*, 73 Conn. 151, 46 Atl. 877, the Connecticut court dissolved an attachment levied on the property of a New York corporation which had been dissolved by New York decree. The Connecticut court held the attachment suit could not be prosecuted to judgment, and says:

"The decree of dissolution pronounced by the Supreme Court of New York was unqualified. It is entitled, under the laws of the United States, to the same effect here which it has there; and it is settled by judicial decision in New York that its statute as to continuances does not, in the absence of any order of court, avail to prolong the existence of the corporation."

As in New York it is settled in Iowa by judicial decision that corporations dissolved by court decree do not survive the decree for any purpose. (See brief point II.)

In *Converse v. Hamilton*, 224 U. S. 243, 56 L. Ed. 749, this Court held that a Minnesota receiver could sue in Wisconsin as a matter of right and not merely by comity, and stated:

"In these circumstances we think the conclusion is unavoidable that the laws of Minnesota and the judicial proceedings in that state, upon which the receiver's title, authority, and right to relief were grounded, and by which the stockholders were bound, were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States."

In *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. Ed. 619, this Court set at rest the proposition that a foreign judgment must be enforced even though contrary to the law of the forum. Under Kansas law one who held judgment against a corporation was permitted to recover against the stockholders. One who recovered such a judgment in Kansas sued a stockholder in Rhode Island, where the Rhode Island court dismissed the action because the Rhode Island law gave no such right to a corporate creditor.

This Court held that full faith and credit had not been given to the Kansas judgment, saying:

> "The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the Constitution of the United States and the Act of Congress be secured."

So in the case at bar the problem is to determine what effect a quo warranto decree dissolving a corporation has in Iowa, and to give that decree that same effect in Montana. For its effect in Iowa see brief points II and VI.

VI.

The Iowa decree of September 25, 1931, effected a present dissolution of Federal Surety Company. If not, the decree of December 22, 1931, certainly did so.

For Iowa decree of September 25, 1931, see Record, p. 21.

For Iowa Decree of December 22, 1931, see Record, p. 26.

The Iowa decree of September 25, 1931, provides:

> "The Court further finds that the assets of the said defendant are in such shape that said Company is unable to meet its current losses and obligations, and that there is grave danger of the loss and dissipation of said assets, and

that the interest of the public requires that said defendant, Federal Surety Company, be dissolved, its effects distributed, and that a receiver be appointed to take charge of and wind up its affairs."

"Wherefore, it is finally ordered, adjudged and decreed:

"(1) That under and in accordance with the provisions of Section 8964 of the Code of 1927 of the State of Iowa the defendant, Federal Surety Company, shall be dissolved and its effects distributed." (R. 22)

Section 8964 of the Code of 1927 (and also of the Code of 1931) among other things provides (appendix hereto, R. 4):

"The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor."

Respondents urge that the language of the decree did not effect a present dissolution but only provided for dissolution at some future indefinite time.

However, Provision (16) of that Iowa decree (R. 26) reads:

"Said Receiver or any other party in interest is hereby given leave to apply to the Court at any time for any other or further directions, orders or decrees as may be necessary or proper, and the Court retains jurisdiction of this cause for this purpose."

Jurisdiction being so expressly retained, the Iowa court on December 22, 1931, entered a further order and decree (R. 30):

"That the defendant, Federal Surety Company, is, and since September 25, 1931, has been dissolved, and that its corporate existence is terminated, with the results hereinbefore determined."

Respondents' judgment against Federal Surety Company was not rendered in Montana until long after the entry of both decrees in Iowa (R. 61, 62).

But the decree of September 25, 1931, did effect a present dissolution.

The provision of this decree was not merely that Federal Surety Company shall be dissolved, but that it shall be dissolved "in accordance with the provisions of Section 8964 of the Code," etc.

The use of the words "shall be dissolved" in the decree is coupled with qualifying words and circumstances which demonstrate clearly that the word "shall" is not used for the purpose of implying futurity only. The use of the word "shall" is coupled with Code Section 8964 (appendix hereto) which requires immediate dissolution.

In 57 C. J. 545, Sec. 2, it is stated:

> "Sometimes the word 'shall' expresses futurity only; and implies no idea of obligation; and in its common and ordinary usage, *unless accompanied by qualifying words*" (our italics) "which show a contrary intent, it is said that it 'always', or 'commonly', or 'usually', refers to the future, and hence is used in the sense of 'will'; but it may be used in a general sense including both past and future, or as indicative of past, present, or future operation, and should be so considered when a more restricted interpretation is not required; and it may be used in the preterit present sense of 'must'."

Referring to the notations we find Note 80, p. 546, as follows:

> "Although the words 'shall be ratified and confirmed' are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they 'shall be ratified and confirmed' by the force of the instrument itself." *U. S. v. Percheman*, 7 Pet. 51, 8 L. Ed. 604, quoting *Viterbo v. Friedlander*, 120 U. S. 707, 30 L. Ed. 776, and citing *U. S. v. Wiggins*, 14 Pet. 334, 349; 10 L. Ed. 481 (where it was said the words "should be construed to mean 'are' ratified and confirmed, in the present tense").

The cases cited are all to the effect that the word "shall" or the word "should" is the equivalent of the word "are" when to give it any other interpretation would do violence to the obvious purpose or intention to be implied from the entire instrument.

And see *Rutherford v. Greene's Heirs*, 15 U. S. 196, 4 L. Ed. 218, where it was held in an opinion by Chief Justice Marshall that the words "25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns," passed title to said land, it remained only that the land be allotted by persons designated to allot lands to officers and soldiers.

We have then this situation:

The statute required the dissolution by the original decree upon a finding "that the interest of the public requires it."

The Court found "that the interest of the public requires that the said defendant, Federal Surety Company, be dissolved."

The court then decreed that the corporation shall be dissolved under and in accordance with the provisions of the statute.

The intention of the court to effect a present dissolution clearly appears.

The language used is fairly suscepible of a construction that will carry out this intention and the mandate of the statute, and is not fairly susceptible of any other construction.

VII.

Petitioner, the Insurance Commissioner of Iowa, took and holds title to the corporate property by virtue of the Iowa statutes which are part of the corporate charter, and not in invitum by the Court's decree. The decree simply put the statutes into operation.

In its opinion (R. 79) the Supreme Court of Montana holds that:

"Even though it be conceded that the appointment of the receiver in the State of Iowa operated to transfer the prop-

erty of the defunct surety company to him, such involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment, where the rights of domestic creditors are involved, if the receiver has not obtained possession of the property and where the creditors have obtained rights or liens upon the property even after the appointment in the foreign jurisdiction."

That holding is an attempt to apply a rule which might be applicable to an appointment based solely on an Iowa decree but disregards the provision of the corporate charter that upon insolvency its property shall pass to a liquidating officer.

In *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337, this Court, speaking through Mr. Chief Justice Waite, said:

"By the charter of this corporation, if a dissolution was decreed, its property passed by operation of law to the Superintendent of the Insurance Department of the State, and he was charged with the duty of winding up its affairs. Every policyholder and creditor in Louisiana is charged with notice of this charter right which all interested in the affairs of the corporation can insist shall be regarded. The appellees, when they contracted with the Missouri corporation, impliedly agreed that if the corporation was dissolved under the Missouri laws, the Superintendent of the Insurance Department of the State should represent the company in all suits instituted by them affecting the winding up of its affairs."

In *Kinsler v. Casualty Co. of America*, 103 Neb. 382, 172 N. W. 33, this very question is considered, and it was held that a Nebraska creditor could not attach property of a dissolved New York corporation in Nebraska. It would unduly extend this argument to quote all the salient language of this opinion. Complete understanding requires consideration of the full opinion. However, the Nebraska court in part says:

"The intervener then is here by statutory authority to wind up the affairs of this corporation, and this is the purpose for which the title to the property of the appellee insurance company is taken over, and it is all done for the benefit of creditors. Nebraska recognized this right when it

issued a license for this company to do business in this state, and there is nothing to prevent the enforcement of this condition in the state of Nebraska. It follows that every condition and every restriction of the State of New York which gave the power of existence to the appellee herein is now taken over and must be respected and followed by this state. The state of Nebraska, when it issued the license to appellee herein, was charged with notice of the terms and conditions and the basis of authority upon which appellee did business, and thus (those) entering into contract, and performing service for the appellee was charged also with notice that these contracts and all business done with the company were subject to the fundamental law of its existence, and this charter provision, and it was a condition precedent to its entering business in the state of Nebraska that it was based on Section 63 of the New York statute, and this charter went with the company wherever it went and into whatever state it obtained license to do business, and notified the respective state in which it was doing business that the insurance commissioner, if the company should become insolvent, or neglected to pay its debts, that all of the property, assets, and credits, and title of every character, should be taken over and become the absolute property of the insurance commissioner of New York. This property and these rights are subject to every provision of its charter right."

"When the appellee obtained license and entered into contract with this state to do business herein, it expressly reserved the right to have its affairs and all property interests adjudicated with reference to the insurance commissioner of New York."

"If Nebraska did not want to recognize this right, or this condition upon which appellee entered into business in this state, it should have withheld the license."

In *Martyne v. Am. Union F. Ins. Co.*, 216 N. Y. 183, 110 N. E. 502, a creditor attached in New York property of a dissolved Pennsylvania insurance corporation. The Court held the property not subject to attachment, saying:

"The statutes of Pennsylvania immediately affecting the existence of the corporation are binding upon creditors in New York. *Ellsworth v. St. Louis, A. & T. H. R. R. Co.*,

98 N. Y. 553; *Relfe v. Rundle*, supra; *Matter of Stewart*, 39 Misc. Rep. 275, 79 N. Y. Supp. 525. Every person dealing with the defendant corporation did so with knowledge of its charter and its charter rights. In case of insolvency it was at all times subject to dissolution, and in such case title to its property by virtue of the statute became vested in the insurance commissioner."

VIII.

Under the Iowa statutes title to the corporate property is vested in the Iowa Commissioner of Insurance, by operation of law, though there are no express words of transfer in the statutes, otherwise it must escheat to the state.

The power of a corporation to hold property is derived solely from the state creating it.

When the creating state withdraws this power, it ends.

Where then, after dissolution, is the title to property held by the corporation prior to its dissolution?

There is no such thing known to the law as title in abeyance.

If there is no other owner, the property escheats to the state.

This is elementary. However, the rule is stated in 10 R. C. L., p. 605, Sec. 4. After stating the English rule, the text proceeds:

> "In the United States, however, since there is no feudal tenure, the escheat of both real and personal property appears to rest upon the broad principle that when property has ceased to have an owner it should be held for the benefit of the whole community. * * * Where there is an escheat of personal property, the crown takes not by succession, but by right of law, because the property has no other owner."

Federal Surety Company having been dissolved, its property would be diverted from creditors and stockholders for the benefit of the general public, unless title thereto vested in the Commissioner. Unless title so vested in the Commissioner, he would be prevented from executing the trust imposed on him by the Iowa statute.

This result is avoided by a well-settled rule of equity: That where no estate is given to a trustee in words, but under the terms of the trust he is required to deal with the property, he takes, by operation of law, such estate as will enable him to carry out the terms of his trust.

1 Perry on Trusts (6th Ed.), Secs. 313, 314, 315.

This Court has in effect recognized this principle in

Bernheimer v. Converse, 206 U. S. 516, 525, 534; 51 L. Ed. 1164, 1172, 1176; and in

Converse v. Hamilton, 224 U. S. 245, 255, 257; 56 L. Ed. 749.

Both these cases were brought by the receiver of a Minnesota corporation, in other states, to enforce a stockholder's liability provided by the Minnesota statutes. The corporation was not dissolved. The statutes made it the duty of the receiver to enforce the stockholder's liability but contained no words transferring any title to him. This Court, after distinguishing the case of *Booth v. Clark*, 17 How. 322, and other cases dealing with chancery receivers, held that the Minnesota statute had conferred the cause of action on the receiver as a quasi assignee, invested with the creditors' rights and entitled to enforce them in any court of competent jurisdiction in Minnesota or elsewhere. To the same effect is *Converse v. Mears*, 162 Fed. 767.

In *Parker v. Stoughton Mills Co.*, 91 Wis. 174, 64 N. W. 751, the Wisconsin court says:

> "So far as there can be any ownership of such property under such circumstances, it must be in the receiver. The corporation will never rise to claim it. It is not the property of the court, and hence, whatever substantial property there is in anyone, must be in the receiver, charged, of course, with his duties in relation to it."

In *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888; 49 L. R. A. 301, the Massachusetts court held that a bank receiver appointed in the State of Washington held *legal title* to a

statutory stockholder's liability as trustee for creditors even though the Washington statute did not so specify.

In *Bullock v. Oliver*, 155 Ga. 151, 116 S. E. 293, Bullock, receiver of an insolvent Florida bank, under a statute which contained no words of transfer of title, sued in Georgia for a statutory stockholder's liability. The Georgia court referred to the distinction between a chancery receiver and a statutory receiver, referred further to the well-established rule that the latter could sue as a matter of right if vested by statute with title, and then holds that a receiver may likewise sue where by *necessary implication* he is vested with title.

These cases are all applications of the rule laid down in *Perry on Trusts* and apply to the case at bar.

IX.

It was not necessary for petitioner to plead that time for appeal from the Iowa decree had expired.

(a) The Iowa decree of December 22, 1931, finds that Federal Surety Company was by the decree of September 25, 1931, "put, without exception or notice of appeal, beyond all further corporate activity" (R. 29).

This needs no elaboration further than to point out that this language can only mean that Federal Surety Company has preserved no exception and served no notice of appeal. It should settle the question whether an appeal was or could be taken.

(b) In pleading a foreign judgment it is not necessary to allege that there is no appeal pending or that the time for appeal has expired. These are matters of defense according to all the authorities.

It appears from the record and the opinion of the Montana Supreme Court that this question was never raised in the state court and that respondents raise it here for the first time. It should not be considered here.

In *A. Coolot Co. v. Kahner* (C. C. A. 9), 140 Fed. 836, the Court says:

However, the rule is as stated in the brief point.

"If the action was brought in California, before the time allowed by the statute of New York for the plaintiff in error to appeal, it would have been a matter of defense in the present action, and could have been set up in the answer, and if true, could have been shown by it; but no evidence of this kind is shown by the record to have been introduced at the trial. It was not necessary for defendant in error to allege that no appeal had ever been taken, nor that the time to take an appeal had expired."

In *Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, a suit on a Wisconsin judgment brought in Illinois, the Supreme Court of Illinois says:

"Unless it appear that the appeal or writ of error suspends the judgment in the state where it was rendered, its pendency is no bar to an action in another state on the judgment (citing authorities). It is not, therefore, necessary to declare upon the foreign judgment as disposed of by the appellate court, but only as rendered by the inferior court, especially where, as in the case here, the judgment of the inferior court does not show upon its face that an appeal from it has been taken. The pendency of an appeal which operates as a stay is a matter to be proved as a defense to, or in suspension of, the action."

In *Birney v. Birney*, 111 N. J. Eq. 37, 161 Atl. 50, the syllabus by the court, in full, is:

"1. It is no bar to an action upon a foreign judgment that the judgment has been removed by writ of error to a superior court, unless it appears that the appeal suspended the judgment in the state where it was rendered.

"2. The suspension of the judgment by appeal must be pleaded by alleging the facts that effected the suspension."

In *Taylor v. Shew*, 39 Cal. 536, an action on a New York judgment, it was held that to constitute a valid defense to such an action it must be shown affirmatively that an appeal had been taken which had the effect to suspend the judgment appealed from.

In *Fredericks v. Clark*, 3 Mont. 258, the Montana Supreme Court held that if an appeal is in the nature of a writ of error, conferring power on the appellate court only to reverse, modify or affirm the judgment of the inferior court and to "remit the case back to the tribunal whence it came, that such tribunal may conform its judgment and proceedings to the views of its superior, then the judgment appealed from does not, until vacated or reversed, cease to operate as a merger or bar. *Freeman on Judgments*, Sec. 328, and cases cited."

X.

The order to show cause why "its business should not be forthwith dissolved," served on Federal Surety Company, gave the Iowa Court jurisdiction to enter a decree of dissolution because the Iowa statute, which was part of its charter, so provides.

Respondents, in the state court and in this court, challenge the jurisdiction of the District Court of Iowa, in and for Scott County, to enter a decree of dissolution because the notice to show cause which brought the defendant into court ordered it to show cause why "its business should not be forthwith dissolved."

Sec. 8964, Iowa Codes 1927 and 1931, being Sec. 1731, Iowa Code 1897, (Appendix hereto, and R. 4), provides:

> "or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why *its business shall not be dissolved.*" (our italics) "The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction" (insolvency-public interest) "he shall decree a dissolution of the company."

The notice to show cause served on Federal Surety Company followed the statute (R. 17).

That the state creating a corporation can provide for its dissolution and has power to provide the form of notice by

which it may be brought before the court for the purpose of dissolution is not open to question.

We know of but one case covering this proposition.

In *Bource v. Trust Francais etc. Co.*, 74 Del. Ch. 332; 127 Atl. 86, the Court says:

> "Nor do we doubt that a state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law."

The language so used by the Delaware court was taken verbatim from a decision of this Court in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

But, after all, the principle is elementary.

XI.

The questions for review by this Court were properly preserved in the Montana courts.

(a) Petitioner set up the title, right, privilege or immunity claimed by him under the constitution.

(b) The effect of the decrees and statutes of Iowa was pleaded and proved.

(c) The entry of the orders and decrees in Iowa was properly pleaded.

John Mieyr filed his complaint, pleading a claim against Federal Surety Company for damages (R. 2);

Pleading the Iowa statutes governing dissolution of corporations (R. 3, par. 5);

Pleading the Iowa decree of September 25, 1931, dissolving Federal Surety Company and appointing E. W. Clark (your petitioner) as receiver and liquidating officer (R. 5, par. 6);

Pleading that by that decree Federal Surety Company has

ceased to exist as a corporate entity and its successor, E. W. Clark, Receiver, is beyond the jurisdiction of this Court (R. 6, par. 10); and

Asking for judgment and the appointment of a receiver in Montana (R. 7).

A receiver was appointed ex parte (R. 8).

Respondents then petitioned for leave to levy execution (R. 11), which petition was granted (R. 14) on certain conditions (R. 12 and 13).

The receiver then moved to set aside the order permitting execution (R. 14).

E. W. Clark (your petitioner) then filed an answer and cross-petition (R. 15);

Admitting (among other things) the allegations of Paragraphs 5 and 6 of complaint (R. 16, Par. 3, Par. 5);

Attaching exemplified copies of the decrees of September 25, 1931, and December 22, 1931, of the Iowa court and letters of receivership to him as Exhibits "A," "B," and "C" (R. 18, 21, 26, 31);

Setting out in full the Iowa statutes (R. 18, 19); and

Praying the confirmation of Crichton as an ancillary receiver (R. 21) and for specific orders as to the rights and duties of such ancillary receiver.

Complainant then admitted the allegations of the answer and cross-petition (R. 34);

And on the pleadings as they then stood the Cascade County court entered its order and decree (R. 34) confirming the appointment of Crichton as ancillary receiver and revoking its leave to respondents to levy execution (R. 39).

Respondents then filed their motion to vacate this order and decree (R. 39) and in the alternative to modify the decree (R. 40).

E. W. Clark (your petitioner) then filed a resistance to this motion (R. 64) setting up that to sustain such motion "would, in violation of Section 1, Article IV of the Constitution of the United States, deny full faith and credit to the

public acts, records and judicial proceedings of the State of Iowa, made and entered in the District Court of the State of Iowa, in and for Scott County, a court of general jurisdiction, in the case entitled State of Iowa, ex rel. John Fletcher, Plaintiff, vs. Federal Surety Company of Davenport, Iowa, Defendant, being cause No. 28238 in equity, in which cause said Federal Surety Company by decrees of said court, duly made and entered on September 25th, 1931, and December 22nd, 1931, was dissolved and E. W. Clark, Commissioner of Insurance of the State of Iowa, was then duly appointed statutory receiver and/or liquidating officer of said Federal Surety Company, and vesting in him title to all property of said Federal Surety Company wherever situated, all of which is more fully shown" in the duly exemplified copies of the decrees attached as exhibits, etc.

Respondents' appeal was from an order overruling their motion to vacate or modify the decree.

Now the statutes, orders and decrees relied upon by petitioner and their effect in Iowa to finally dissolve the corporation and vest title to its assets in your petitioner was all pleaded as set out in our statement of the case and in this division of our argument.

These allegations were not controverted. The facts pleaded were not denied. No issue respecting them was joined. The allegations of the complaint and of the answer and cross-petition were therefore established without proof.

(b) The effect of the decrees and statutes of Iowa was pleaded and proved.

After petitioner's resistance to respondents' motion was filed, it was stipulated that the statutes and decrees pleaded are correctly set out, etc. (R. 65).

The effect of these statutes and decrees was proven by the findings and orders of the decree of December 22, 1931 (R. 29, 30).

(c) The entry of the orders and decrees in Iowa was properly pleaded.

In their brief in resistance to our petition for certiorari, on Page 11, respondents insist that it was not alleged that the

Iowa judgments were "duly given and made" as required by the Montana statute.

This allegation appears repeatedly (R. p. 5, Par. 6, and R. pp. 64. 65).

Moreover, respondents raised no such question in the Montana courts and cannot raise it here for the first time.

XII.

The title which enables a liquidator to sue for property in another state necessarily precludes any other from suing for it. The charter provisions, in the form of statutes providing for dissolution and liquidation, are implied terms of every contract which the corporation makes with its creditors. This precludes the creditor from in any manner interfering with the liquidator's control of the corporate property wherever situated.

We think it follows from the principles heretofore discussed that, where the statutes of the domiciliary state of a corporation provide for its dissolution and the liquidation of its assets by a state officer, this liquidator has the sole right to the corporate property, in trust, of course, for creditors and stockholders, wherever situated, and that such is the effect of a decree of dissolution in the domiciliary state, which other states are bound to recognize.

The rule that a state has exclusive jurisdiction over all property within its borders is subject to the constitutional provision that it must give full faith and credit to the public acts, records and judicial proceedings of every other state.

This was directly held by this Court in *Roche v. McDonald*, 275 U. S. 449, discussed under brief point V, and holding that a judgment, if valid where rendered, must be enforced in another state although repugnant to its own statutes.

If the liquidator appointed under such statutes takes title to all corporate property, in trust, then this title must be recognized everywhere and excludes any conflicting rights to such corporate property.

It follows that creditors cannot subject the corporate property to their debts, even though it be situated in another state,

and that all creditors are cestuis que trustent and this is their sole right in the corporate property.

They cannot repudiate the trust. They agreed to it when they contracted with the corporation.

In *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337, this Court held:

> "By the charter of this corporation, if a dissolution was decreed, its property passed by operation of law to the Superintendent of the Insurance Department of the state and he was charged with the duty of winding up its affairs. Every policyholder and creditor in Louisiana is charged with notice of this charter right."

In *Cogliano v. Ferguson*, 245 Mass. 364, 139 N. E. 527, the Court said:

> "The contract having been made with a foreign corporation, among its implied terms were the provisions of the statute under which it was organized and could be dissolved and its assets distributed among creditors."

In *Mumma v. Potomac Co.*, 8 Peters 284, 8 L. Ed. 945, this Court said:

> "A corporation, by the very terms and nature of its political existence is subject to a dissolution by a surrender of its corporate franchises and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic and to contract with reference to them."

CONCLUSION

Federal Surety Company existed only by virtue of Iowa statutes, among which were those limiting such existence. That is, Iowa gave it a limited life. When such limitation took effect it was as though its life had never been.

Iowa could refuse to give it life at all. Or it could give it a limited life, which it did. When that limited span ended, it was dead everywhere. The laws of Iowa never created more

than that limited span, and when that span ended the creation ended.

In creating this limited existence it was incumbent upon the State of Iowa to provide for the liquidation of such property as it might leave behind it, and this it did, providing in effect that such property should be applied:

First: To its creditors, pro rata;

Second: To its stockholders, if creditors did not exhaust it;

Third: The corporate property should go to one of the state officers in trust for these purposes.

At common law the corporation's real estate reverted to its grantors.

Its personal property went to the crown.

There was no legal obligation on the State of Iowa to relax these rules at all. It saw fit to relax them to the extent above stated. It had the legal right to do this, and all states must recognize it.

It follows that no judgment could be entered against it and that no execution or attachment could issue, at the instance of its creditors, against the property held in trust for all the creditors.

These were the effects of the Iowa statutes and decrees, and these effects the Supreme Court of Montana refused to recognize.

Our contentions are founded not only on precedent but upon the necessities and exigencies of business as transacted in the United States.

The constant tendency has been toward the interstate transaction of business in corporate form. Our railroads, insurance companies, manufacturers, and distributors are no longer wholly localized. The activities of many extend beyond the state of domicile and in many instances extend throughout the forty-eight states.

The doctrine of the Montana court would provoke retaliatory legislation which, if permitted to govern, will not only hamper our commerce but will render impracticable attempts

to liquidate affairs of an insolvent concern which has transacted business in the several states.

Upon insolvency of such a corporation, all equitable principles call for a distribution of its unencumbered assets ratably to unsecured creditors irrespective of residence or of geographical location of assets. When the state of domicile provides for such ratable distribution, that purpose should be carried out, and all reasonable implications and interpretations essential to that end should be made.

The iniquity of the Montana decision is the more glaring because that opinion first denies any remedy by way of ancillary proceedings and then proceeds to hold that its citizens have their remedy by way of attachment and execution irrespective of the rights of creditors resident elsewhere.

While technically the citizens of other states might similarly avail themselves of those remedies in Montana, nevertheless as a practical matter the advantage is with the Montana residents. The Montana Supreme Court evidently recognized that it could not segregate the Montana assets for its own citizens by any formal proceeding without offending the equal rights clause of the Constitution. Its decision goes to the same end, however, because that decision refuses to permit any obstruction to the right of attachment and levy of execution and encourages its citizens in the use of those remedies.

If that doctrine is permitted to govern, the state of domicile of a corporation will be powerless to provide for ratable distribution. Inasmuch as an insurance corporation cannot be adjudicated a bankrupt under the Federal bankruptcy act, the ratable distribution of assets of an insolvent insurance corporation under the Montana doctrine would be impossible, and the door would be open to all of the well-known abuses which were so prevalent in this country with respect to commercial corporations prior to the adoption of the present bankruptcy act.

The record is conclusively for petitioner with but two possible exceptions, viz.:

1. Use of the words "shall be dissolved in accordance * * " in the Iowa decree, and

2. The omission from the Iowa statute of words *expressly* transferring title to the Iowa Commissioner.

To accord the present tense to the word "shall" *and its accompanying text* is justified on unquestioned authority, including that of Chief Justice Marshall.

To imply a transfer of title to the Iowa Commissioner essential to carrying out the trust imposed on him by the statute is but the application of an axiom well known to the law of trusts.

Neither is strained. Both are called for by the clear-cut necessity for equitable, ratable, and relatively inexpensive corporate liquidation, which is a benefit that would permanently flow from a reversal in this cause.

It is respectfully submitted that the decision of the Montana Supreme Court should be reversed.

REUEL B. COOK,

EDMOND M. COOK,

M. S. GUNN,

Counsel for Petitioner.

APPENDIX.

Statutes.

Judicial Code, Section 237, as Amended by Act of February 13, 1925.

(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity, or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding para-

graph be an obstacle to granting a review on certiorari under this paragraph.

(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: PROVIDED, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title.

Section 8402, *Code of Iowa*, 1927 *and* 1931, *Being Also Section* 1640 *of the Code of Iowa*, 1897.

Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the State of Iowa. An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them.

Section 8964, *Code of Iowa*, 1927 *and* 1931, *Being Also Section* 1731 *of the Code of Iowa*, 1897.

The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents, or stockholders of any insurance company doing business in the state, to examine into the affairs and condition of any such company incorporated or doing business therein, or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when

the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge.

Section 8613-el, Code of Iowa, 1931, Being Chapter 233 of the Acts of the 43rd General Assembly of Iowa.

The commissioner of insurance henceforth shall be the receiver and or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK, AS RECEIVER,
PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,
AS TRUSTEES OF GORDON-CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON LAW TRUST, RESPONDENTS.

PETITIONER'S REPLY

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REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF

We shall reply very briefly to some of the propositions argued by respondents, following their subdivisions.

I.

Whether the corporation was dead in Montana is not procedural nor does it pertain to the remedy.

Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257; 71 L. Ed. 634;

where Chief Justice Taft, speaking of this, says:

> "The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being."

And other cases cited under Brief Point III Petitioner's Supplemental Brief.

II.

The Montana Court had before it for decision the status of respondents' judgment, their execution under this judgment, and their levy under this execution; for respondents' right to appeal depended solely upon their having a valid judgment, a valid execution, and a valid levy.

The Montana decision is, not that respondents' judgment is voidable and not open to collateral attack, but that it is a valid judgment, not even open to direct attack. (R. 77, last Par.)

What the Montana Court decided is, that at common law no valid, personal judgment can be had against a dissolved corporation; but that the Montana statutes keep all foreign corporations alive for purposes of suit, and it follows that suits may be begun against foreign corporations after their final dissolution at home.

The question whether a judgment entered against a dissolved corporation in a suit begun before its dissolution is void or voidable; whether it may be attacked collaterally or only directly, is not here involved.

However, we understand the common law rule as to a dissolved corporation to be that not only does the suit abate but the debt or claim upon which it rests abates, and that any personal judgment thereafter entered against it is a nullity, absolutely void.

This was argued in the Montana court and the court held that this was the common law rule. It then further held, not that a cause of action against the dissolved corporation survived dissolution; but that the Montana Court (because of Montana statutes) would not recognize the dissolution.

While we do not believe the question whether a judgment entered against a dissolved corporation in a suit begun before its dissolution is void or voidable is before this court, we have examined it. Respondents, to support their contention that such a judgment cannot be collaterally attacked, cite only text-writers.

In an appendix hereto we set out an analysis of the cases cited in support of the text.

III.

Counsel argues that respondents did not become parties to proceedings in the lower court.

If they did not, they had no right to appeal. The fact that their appeal was entertained conclusively establishes their status as parties. They obtained an adjudication that their judgment is valid.

Counsel also argue under this subdivision that the Supreme Court held that the District Court had no jurisdiction of the proceeding.

Counsel are mistaken about this.

Mieyr in his complaint asked for judgment against Federal Surety Co. and Clark, Receiver, for Two Thousand Seven Hundred Forty-two and 70/100 ($2,742.70) Dollars, interest and costs, and for appointment of a receiver and other relief. (R. 7)

The Supreme Court held the appointment of a receiver was erroneous. It did not hold that the court was without jurisdiction of the proceeding.

Should the decision of the Montana Supreme Court stand, the proceeding would still remain pending on plaintiff's prayer for judgment, and under the decision of the Montana Supreme Court he would be entitled to judgment on the face of his complaint.

An intervenor must take the case as he finds it.

47 C. J., Sec. 221, p. 116.

V.

Conceded that an insurance corporation is not engaged in interstate commerce.

That a state may exclude a foreign insurance company.

That it may restrict the exercise of its powers and impose conditions upon its admission.

But it cannot give it additional powers or attributes nor alter the provisions which have been made in its charter for the control and management of its affairs.

Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 337;
Riddell v. Rochester German Ins. Co., 35 R. I. 45; 85 A. 273.

VI.

Every case cited by respondents under this subdivision is a case where a statute *of the domicile of the corporation* continued it after dissolution for the purpose of winding up its affairs. There could be no substitution. The corporations were alive. The cases mean nothing in this proceeding.

VII.

Here respondents seek to limit the doctrine of *Relfe v. Rundle*.

They cite one case, viz. *Williams v. Gaylord*, 186 U. S. 157; 46 L. Ed. 1102, as having this effect.

This case only holds that a state may *restrict* the powers of a foreign corporation transacting business within its jurisdiction. It further holds that the state has no power to regulate the organization or internal government of a foreign corporation.

Respondents argue that the "death" of a corporation is only a rule of expediency and that by the Montana statutes the corporate life, a mere fiction, is not legislated upon.

The Supreme Court of Massachusetts has spoken about this in *Remington v. Samana Bay Co.*, 140 Mass. 494; 5 N. E. 292.

That Court says:

> "It is true that the existence of a corporation is a fiction, but the very meaning of that fiction is that the liability of its members shall be determined as if the fiction were the truth. That fiction or artificial creation is *wholly within the power of its creator*" (our italics) "and persons who deal with it must be taken to understand that it is so."

VIII.

Respondents here assert that "Montana has not undertaken to say that a dissolved foreign corporation is alive in Montana. It has only said that it remains suable."

This is a distinction without a difference. The one includes the other. Without a defendant there is no issue before the court.

In *Oklahoma Natural Gas Co. v. State of Oklahoma*, 273 U. S. 257; 71 L. Ed. 634, Chief Justice Taft, speaking of the effect of corporate dissolution, says:

> "To allow actions to continue would be to continue the existence of the corporation pro hac vice."

In *Fitts v. National Life Assn. of Hartford*, 130 Ala. 413; 30 S. 374, treating the right to sue a dissolved foreign corporation, the Alabama court says:

> "It would be a doctrine new to the law that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter."

In *First National Bank of Selma v. Colby*, 21 Wall. 609; 22 L. Ed. 687, Mr. Justice Field, speaking of the right to sue a dissolved corporation, and statutory provisions as to survival and revivor of suits against an individual, says:

> "No such provision exists as to corporations, nor, indeed, could exist without reviving the corporation pro hac vice."

Under this subdivision respondents say:

> "While the facts in *Relfe v. Rundle* are easily distinguishable from the case at bar, the doctrine therein announced has been refused application in other cases where the law of the forum was different. *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262; 45 L. Ed. 181."

So far is this case from refusing application of the doctrine of *Relfe v. Rundle* that it by necessary implication approves that doctrine.

A New York insurance company wrote a life insurance policy in Montana. The assured died while certain premiums were unpaid. Suit was brought on the policy in the United States Circuit Court for the District of Washington. The defense was non-payment of premiums that came due.

The statutes of Montana contained no provision requiring the insurer to give the assured notice of premiums coming due. The New York statutes provided that no policy should be forfeited or lapsed for non-payment of premiums until notice that premium was due.

The sole question was whether the New York law or the Montana law governed.

Before deciding this question this Court inquired whether the New York statute involved was a part of the charter of the New York corporation and found that it was not. The court then, and not until then, held that the law of Montana, where the contract was made, governed and the policy lapsed.

The implication is clear that if the New York statute was a part of the corporate charter it would govern; else why the inquiry.

IX.

Under this subdivision respondents argue that a state may by statute provide that a foreign corporation shall remain subject to suit indefinitely until its contracts have been performed.

This is no doubt true so long as the foreign corporation is alive. Respondents, however, seek to extend the rule to a finally dissolved foreign corporation and cite authorities which, as we understand them, do not so decide.

Counsel first quote *Fletchers Enc. Corp.*, Vol. 8, p. 9720, to the effect that the legislature of a state may provide that a foreign corporation which has been dissolved, but which owns property and owes debts in such state, may be sued and the property subjected to the payment of such debts, and that legislation was held constitutional by the Supreme Court of the United States and citing:

McGoon v. Scales, 9 Wall. 23; 19 L. Ed. 545.

This case involved the validity of an attachment proceeding in Wisconsin under which lands of an Illinois corporation were sold in Wisconsin. A proceeding in rem.

There was some claim that the Illinois corporation had been finally dissolved. But the case never involved the right to take personal judgment against a dissolved corporation.

But more than that. The charter of the Illinois Bank was revoked by an act of the Illinois Legislature which provided for trustees to wind up its affairs and provided:

> "The real estate of said Bank shall be liable to taxation and sale on execution in the same manner as the property of individuals."

This might well be held to continue the existence of the corporation for the purpose of proceedings against it to subject its real estate to its debts, and apparently this Court took that view, for it said:

> "It is by no means certain that the Bank had no capacity to sustain a suit, notwithstanding the expiration of its charter and the transfer of its property to trustees."

Furthermore, the trustees appeared in the attachment proceedings.

The case is certainly not authority for the proposition that personal judgment may be taken against a finally dissolved foreign corporation; nor authority for the proposition that when a charter provision says its property shall go to trustees, for the equal protection and benefit of creditors and stockholders, such property may be taken on execution for the benefit of one creditor.

Respondents then cite seven cases which they claim support their contention. (One case is cited twice.)

Stetson v. New Orleans City Bank, 2 Ohio St. 167; 12 Ohio St. 577.

A Louisiana corporation assigned its property. Its charter then expired. The Ohio Court permitted the assignee to sue

in the name of the dissolved corporation. A very different thing from permitting the dissolved corporation to sue in its own behalf.

Hanger v. International Trading Co., 184 Ky. 794; 214 S. W. 438.

This is the only case which respondents cite or we have been able to find which holds that a statute can keep alive a finally dissolved foreign corporation.

The court says:

> "The common law rule that the debts and liabilities of a corporation are extinguished by its dissolution has been changed by statute which applies to domestic, and also to foreign corporations *having their principal place of business in this state*, and continues their legal existence for the purpose of winding up their affairs."

The proposition is announced, but not reasoned nor discussed. It certainly is not binding on this court and should have been reversed had it been brought here.

Singer v. Hutchinson, 83 Ill. App. 675; 183 Ill. 606.

This case dealt with a domestic corporation, organized under the laws of Illinois.

Castle v. Acrogen Coal Co., 145 Ky. 591; 140 S. W. 1034.

Defendant, a West Virginia corporation, was continued by domiciliary statute. The Kentucky decision that it was continued by statute of the forum is dictum.

Olds v. City Trust etc. Co., 185 Mass. 500; 70 N. E. 1022.

This is a proceeding in rem.

The court held that it would not recognize the dissolution of a New York corporation by decree of a New York court, in the absence of any proof of a New York statute authorizing

such a dissolution. This is all the court decided. There is some dictum in the opinion.

Rogers v. Adriatic F. Ins. Co., 148 N. Y. 34; 42 N. E. 515.

The New York court held it would not recognize an Illinois judgment against a New York corporation finally dissolved in New York. Anything said as to the right of Illinois to enter such a judgment is pure dictum.

Life Assn. v. Fassett, 102 Ill. 315.

The Court found that a Missouri corporation had not been finally dissolved and was still in existence in Missouri and affirmed a judgment against it on that ground. The opinion discusses the effect of an Illinois statute in keeping the foreign corporation alive in Illinois and says it does not see why it should not; but it does not decide the case on this ground.

Andrews v. Andrews, 188 U. S. 14; 47 L. Ed. 366.

Cited for some purpose, at the end of this division, is a divorce case. It has nothing to do with any proposition involved here.

XII.

There can be no doubt the Iowa statutory charter provision imposed a trust for the equal benefit of creditors upon the successor (call him what you will) of Federal Surety Company.

The cases presented by Respondent under this heading all involved corporations which had not been finally dissolved; they remained in existence either because the statute did not provide for dissolution or because as in *Sterret v. Second National Bank*, 248 U. S. 339, the courts of the domicile had so construed the domiciliary statute. Where, as in this case, the corporate existence is irretrievably ended, it can no longer hold the title and the statute imposes the duty upon its successor to liquidate and distribute the assets.

It matters little whether we say this trustee had title, or had power to carry out the trust.

He is not a chancery receiver, for there is no such thing known to chancery as a receiver for the property of a dead man or a dissolved corporation.

XIV. and XV.

Respondents here point out that Federal Surety Company entered Montana before the Iowa statute requiring that the Iowa Superintendent of Insurance be the receiver and or liquidating officer for insurance companies was enacted.

We have not argued that the statutory successor of the dissolved corporation holds as a trustee the assets formerly owned by it because he is a state officer.

The statutory charter provisions fix the character of such statutory successor and clothe him with the powers and duties of a liquidator and not of a receiver and make him a trustee holding the assets of the dissolved corporation for the equal benefit of its creditors, whoever he may be. It is highly proper he should be a state officer; but the rules we assert do not depend upon it.

XVI.

Respondents here say that in

Schloss v. Met. Surety Co., 149 Ia. 382, 128 N. W. 384,

is found a complete analysis of this very situation and that the Iowa Court differentiates *Relfe v. Rundle*.

If this were true, it would not be binding on this Court.

But the fact is that in this case the questions presented here were never raised.

The case was decided in the lower court on demurrer to an answer which, so far as the opinion discloses, did not plead the statutes of New York.

The defense was not and could not be based on the charter provision of the defendant corporation for no charter provisions were pleaded.

Under this heading respondents' counsel attach significance to the fact the Iowa Court designated petitioner as "Receiver"

and not as "Liquidating Officer." It may be inferred the Iowa Court advisedly selected the term "Receiver" because the Iowa Supreme Court in *State v. Fidelity Loan Co.*, 113 Ia. 439, had previously held that dissolution and appointment of a *Receiver* put an end to a corporation for all purposes. That holding certainly makes the Receiver in such cases more than a mere officer of court.

CONCLUSION

Regardless of the validity of respondents' judgment their execution levy is invalid. *See Ransom v. Williams*, 2 Wall. 313; 17 L. Ed. 803.

Moreover, every contract creditor of the dissolved corporation agreed when he dealt with it that should it become insolvent and its assets insufficient to pay all creditors in full, such assets should go to a trustee representing all the creditors for their equal benefit and to be liquidated and distributed pro rata among all creditors.

No creditor can repudiate that agreement and seize property so passing to such trustee for his own benefit.

If he holds a valid judgment, this may liquidate his claim to be filed with the trustee; but it cannot permit him to seize the trust property on an execution issued under it.

Upon the final dissolution of the corporation its property passed from it and is no longer property of the corporation. It cannot, after dissolution, be seized as the property of the corporation, for it is no longer such.

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APPENDIX

Respondents (Page 4, Supplemental Brief) say that the dissolution of Federal Surety Company in Iowa was not suggested and did not appear of record in their Fergus County law action, and that therefore their judgment is not void but is voidable only and impervious to collateral attack. Their Brief cites no court decisions, but quotes only from Corpus Juris and Ruling Case Law. Those texts also recognize the rule that a judgment rendered after death is by many authorities held to be utterly void. The text, insofar as it holds that a judgment after death is voidable only, is not supported by most of the authorities in the footnote.

At Pages 2 and 3 of this Brief we demonstrate that the Montana decision does not involve suryival of actions. The Montana Court says there was no corporate death to be survived; they say the corporation did not die in Montana.

If the Montana Court had held that the judgment was voidable only and therefore impervious to collateral attack, then the Iowa Commissioner could have proceeded with a direct attack. But the Montana decision forever blocks a direct attack because it says the corporate existence was not terminated and that respondents' action proceeded to valid judgment against an existing corporation. It is that holding we complain of.

Nevertheless respondents have raised the question that their judgment is good on its face and cannot be collaterally attacked. While we do not believe the question is here involved, we recognize that the texts and supporting decisions are in serious confusion. For such use as it may be to the Court, we have analyzed approximately one hundred of the decisions cited in the footnotes to the text and hereinafter set out our analysis somewhat at length.

There is no case which holds that judgment against a finally dissolved corporation is voidable only. Therefore, the decisions relating to judgments against individuals are valuable only by analogy, which is not in point in view of the decisions passing on judgments against finally dissolved corporations. There are

cases which say that such a judgment is utterly void and which have said so on collateral attack.

Pendleton v. Russell, 144 U. S. 640; 36 L. Ed. 574;
Marion Phosphate Co. v. Perry, 74 Fed. 425;
Remington v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292.
Crossman v. Vivienda Water Co. (Calif.), 89 P. 335;
New Hall v. Western Zinc Co. (Calif.), 128 P. 1040;

Even though the rule be as contended by respondents, it is subject to a well-recognized exception. The rule against collateral attack only precludes proof of facts not appearing in the record, but when those facts are undisputed or are admitted the court will pass on the validity of the judgment.

Hill v. City Cab Co. (Calif.), 21 P. 728;
Akley v. Basset (Calif.), 209 P. 576 at 581.

By their stipulation (R. 65) appellants admit the facts which render their judgment a nullity and absolutely void, but say to the court that notwithstanding such admission they should be permitted and assisted by virtue of that void judgment to gain a preference over other creditors of the same class.

Proceeding to the texts which respondents cite, we find that the text in 33 C. J. 1107 recognizes and states:

> "A judgment rendered for or against a party after his death, according to numerous decisions, is utterly void, and as such subject to collateral attack."

Those texts only say that the numerical weight of authority is the other way. The following analysis is to demonstrate that the numerical weight of authority holds that judgment after death is absolutely void even though the court had acquired jurisdiction before death.

We have also analyzed forty-seven decisions which are cited by the Corpus Juris text as supporting the rule that the judgment was absolutely void, even though the court acquired jurisdiction of the defendant before death. We have eliminated all of those decisions which are purely dictum and which did not squarely involve the point, and find that there are decisions

from nine courts which squarely and necessarily decided the question and which held that the judgment was absolutely void. We present the following eighteen citations from those nine courts as supporting our position.

Alabama	Meyer v. Hearst, 75 Ala. 390.
	Swink v. Snodgrass, 17 Ala. 653, 52 Am. D. 190.
Arkansas	Jacobsen v. Campbell, 12 S. W. 784.
Indiana	Bivens v. Henderson, 42 Ind. A. 562, 86 N. E. 426.
Kansas	Kager v. Vickery, 61 Kan. 342, 59 P. 628, 78 Am. S. R. 318, 49 L. R. A. 153.
Louisiana	Edwards v. Whited, 29 La. Ann. 647.
	McCloskey v. Wingfield, 29 La. Ann. 744.
	Norton v. Jamison, 23 La. Ann. 102.
	New Orleans etc. R. Co. v. Bosworth, 8 La. Ann. 80.
Mississippi	Weis v. Aaron, 75 Miss. 138, 21 S. 763, 65 Am. S. R. 594.
	Parker v. Horne, 38 Miss. 215.
Missouri	Cole v. Parker-Washington Co., 276 Mo. 220, 207 S. W. 749.
New York	Requa v. Holmes, 16 N. Y. 193.
	Requa v. Holmes, 26 N. Y. 338.
	Arents v. Long Island R. Co., 36 App. Div. 379, 55 NYS 401.
	People v. Bellando, 137 App. Div. 777, 122 NYS 543.
Tennessee	Morrison v. Deaderick, 10 Humphr. 342.
	Kelly v. Hooper, 3 Yerg. 395.

The foregoing cases are squarely in support of the proposition that a judgment is utterly void if rendered after death, even though jurisdiction was acquired before death. The re-

maining cases, more than thirty in number, are not relevant to the discussion. Attention is directed especially to the following two cases, which contain each a very learned discussion of the entire subject and demonstrate the source and nature of the misapprehension that exists on this subject:

Cole v. Parker-Washington Co., 276 Mo. 220, 207 S. W. 749;

Kager v. Vickery, 61 Kan. 342, 59 P. 628, 78 Am. S. R. 318, 49 L. R. A. 153.

The text that such a judgment is voidable only is supported by decisions from eight courts instead of twenty-three as the footnote pretends. The decisions from the other fifteen courts contain discussions which are dictum or may be distinguished as shown by the following analysis.

The sixty-six decisions examined by us and cited in support of the text that the judgment is voidable only may be summarized as follows:

8 DECISIONS BY 6 COURTS
IN POINT — SUPPORT THE TEXT.

1 DECISION BY 1 COURT
IN POINT — BASED ON SURVIVAL STATUTES.

This case recognizes the common law rule and holds that it has been changed by survival statutes in its particular jurisdiction.

5 DECISIONS BY 1 COURT
IN POINT — TEXAS DECISIONS.

The Texas court has departed from all basic principles in considering this subject and has even held that judgment is not void though the defendant was dead when the action was commenced:

4 DECISIONS
DISTINGUISHED — JUDGMENT FOR DEAD PLAINTIFF OR DEFENDANT.

These are not authority for upholding judgment against

a dead defendant. Judgment *for* a dead party may be upheld on the ground that he assented to it; whereas, judgment against a dead party totally lacks vitality, 1st, because he did not assent to it, and 2nd, because there was no one before the court upon whom judgment in personam could be enforced.

13 DECISIONS
DISTINGUISHED — DID NOT INVOLVE JUDGMENT FOR OR AGAINST DEAD PARTY OR DID NOT INVOLVE THE POINT UNDER CONSIDERATION.

These cases dealt with extraneous subjects, such as, judgments against insane persons.

16 DECISIONS
DICTUM — DIRECT ATTACK.

Facts required only a holding that the judgment under consideration was voidable and did not call for a decision that the judgment was void.

4 DECISIONS
DICTUM — NUNC PRO TUNC ENTRY UPHELD.

In each of these cases trial was had during lifetime, and after death judgment entered as of the day of trial. These cases are not applicable because such nunc pro tunc entries have been upheld on the theory that the representatives of a party should not be prejudiced where the delay is occasioned by the court due to press of other matters or for other reasons.

5 DECISIONS
DICTUM — ESTOPPEL OF OPPOSITE PARTY.

In each of these cases some fact was found which estopped the opposite party from raising the point, and, therefore, the discussion of the question, void or voidable, is dictum.

3 DECISIONS
DICTUM — ATTACK BARRED BY STATUTE OF LIMITATION.

There are statutes which limit the time within which

even a void judgment may be attacked. These cases involve such a statute. Discussion of the question, void or voidable, was unnecessary.

2 DECISIONS
DICTUM — PLAINTIFF IN ERROR DIED PENDING APPEAL.

As stated by Justice Story in *Green v. Watkins*, 18 U. S. 260, death of plaintiff in error pending appeal has never abated the appeal where the judgment below was rendered before death.

1 DECISION
DICTUM — JOINT PARTIES.

Involves facts where the surviving parties had capacity in the absence of the dead party to prosecute or defend.

1 DECISION
DICTUM — PARTY DEAD WHEN ACTION COMMENCED.

With the exception of Texas courts, it has been universally recognized that a judgment in such a case is utterly void. Nevertheless, in deciding such cases some courts discussed the question of void or voidable. That discussion under those circumstances was purely dictum.

3 DECISIONS
IN POINT — HOLDING OPPOSED TO THE TEXTS OR OVERRULED BY LATER DECISION.

We proceed now to an analysis of each of the cited cases.

New Orleans v. Gaines, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102
Distinguished — does not involve the point.

The City of New Orleans appealed to this Court from several judgments against it. Other actions had been commenced and decrees obtained against individual defendants for the same causes of action. For the City it was urged that several of the decrees in those separate actions had been rendered after the deaths of the defendants therein and were therefore subject to attack. This Court

held that the cause of action against the City was not dependent on the validity of those decrees against the individuals, and therefore this Court did not decide the question whether those judgments or decrees against the individuals were void or voidable.

Coughlin v. Dist. of Columbia, 106 U. S. 7, 1 S. Ct. 37, 27 L. Ed. 74
Distinguished — decided on another point.

Plaintiff died after an appeal to this Court from an order of the General Term in the District of Columbia which had set aside a judgment in his favor. His administrator continued the appeal. This Court reversed the order of the General Term and ordered that the judgment in favor of plaintiff be affirmed as of its original date of entry in order to prevent abatement. That case does not even discuss and in no way involves the question whether the judgment in favor of the plaintiff was void or voidable and in no way supports the text.

Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369
Dictum — entry nunc pro tunc.

Suit in Ohio on an Iowa judgment. The defendant in the Ohio suit attacked the Iowa judgment because it had been rendered for plaintiff after plaintiff's death but nunc pro tunc as of the day of trial, which had taken place during plaintiff's lifetime. This Court upheld the Iowa judgment and approved the entry nunc pro tunc on the ground that the rights of a party litigant or his representatives should not be prejudiced by a delay occasioned by the court due to press of other matters or for other reasons.

Todhunter v. Klemmer, 134 Cal. 66, 66 P. 75
In point — supports the text.

Wallace v. Center, 67 Cal. 133, 7 P. 441
In point — supports the text.

Phelan v. Tyler, 64 Cal. 80, 28 P. 114
Dictum — direct attack.

Involved only the death of a plaintiff in error pending an

appeal. Judgment of the appellate court was directly attacked so that language in the opinion is dictum. Case also is governed by the rule, announced in Green v. Watkins, 18 U. S. 260, by Justice Story, that death of plaintiff in error does not abate the appeal.

Parsons v. Parsons, 70 Colo. 154, 198 P. 156
Distinguished — decided on another point.

California divorce decree does not become final until six months after entry. Defendant died after the decree but before the six months expired. Held that the findings of fact in the original entry determined the status of the parties. Discussion of the void-voidable question was not essential to the decision.

Cochrane v. Parker, 12 Colo. A. 169, 54 P. 1027
Dictum — plaintiff in error died pending appeal.

Collins v. Mitchell, 5 Fla. 364
Dictum — estoppel of opposite party.

Collateral attack. Action on a release bond. Point raised that judgment against the principal on the bond was void. Court held that the surety, by signing the bond at a time when the fact of death was known to him, was estopped to raise that question.

Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. S. R. 263
Dictum — direct attack.

The attack on this judgment was made in the proceeding where it was rendered. Therefore, the only decision required was that the judgment was voidable only.

Danforth v. Danforth, 111 Ill. 236
Dictum — nunc pro tunc entry upheld.

Motion to set aside a decree on the ground of fraud taken under advisement. Motion overruled after death of the moving party but by order entered nunc pro tunc. Question of void or voidable was, therefore, not in issue.

Pyatt v. Riley, 252 Ill. 36, 96 N. E. 570
Distinguished — decided on another point.

Suit commenced in name of partnership. Claim assigned to an individual and continued in the name of the partnership for his use. He then died, and his administrator was substituted and the case continued in the name of the partnership for the use of the administrator. In the meantime the partnership was dissolved by death of a partner. Held that the continuation of the suit for the use of the assignee was not improper, and the judgment was upheld.

Bushnell v. Cooper, 289 Ill. 260, 124 N. E. 521, 6 A. L. R. 1517
Dictum — estoppel of opposite party.

Separate maintenance suit was tried. Plaintiff then died. Thereafter decree was rendered in her favor. Defendant knew of death but did not raise the point. The court held that he was estopped to raise the point after the term ended, although the court did recognize the rule that divorce actions abate absolutely upon the death of one of the parties.

Stoetzell v. Fullerton, 44 Ill. 108
Dictum — joint parties.

This involved a collateral attack but on a judgment in favor of several plaintiffs, one of whom died before judgment. Court held that the surviving plaintiff had a sufficient interest in the cause of action to sustain the judgment.

Pfirshing v. Heitner, 91 Ill. App. 407
Dictum — direct attack.

This case was based entirely on the Illinois decision in Claflin v. Dunne, which in turn involved a direct and not a collateral attack.

Gilman v. Donavan, 53 Iowa 362
Dictum — attack barred by statute of limitation.

Judgment had become valid by running of statute of limitation against any attack.

Nelson v. Gray, 2 Greene 397 (Ia.)
Dictum — direct attack.

Arose on motion for new trial of a case where judgment was rendered against a defendant whom the record showed to be dead. Did not require the court to pass on the question whether the judgment was void..

Ratterman v. Apperson, 141 Ky. 821, 123 S. W. 1005
Dictum — direct attack.

Action was revived after death. Held that judgment after revivor was entirely regular.

Spalding v. Wathen, 7 Bush 659 (Ky.)
Dictum — plaintiff in error died pending appeal.

This case upholds the rule that death of plaintiff in error does not abate the appeal, but distinguishes between death of plaintiff or appellant, on the one hand, as compared with death of the defendant or appellee, on the other hand.

Case v. Rebelin, 1 J. J. Marsh 29 (Ky.)
Dictum — direct attack.

Arose on application for writ of error coram nobis, which was held to be the proper method of attack.

Mosely v. Morgan, 252 S. W. 117 (Ky.)
Dictum — estoppel of opposite party.

Plaintiff died after submission and before judgment. Defendant held to be estopped from attacking the judgment.

West v. Jordan, 62 Me. 484
Dictum — direct attack.

Judgment rendered in favor of deceased plaintiff without substitution. On application of administrator judgment vacated and judgment entered in his name as representative.

Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. D. 649
Dictum — direct attack.

Stockholder of bank complained about enforcement against him of a judgment which had been rendered

against the corporation after dissolution. Court held that no judgment could be entered against the dissolved corporation, but based its decision on a Maine statute which rendered the stockholder liable in any event.

Reid v. Holmes, 127 Mass. 326
Dictum — estoppel of opposite party.

Party who had recovered judgment against the deceased defendant attempted to proceed against the executors on the same cause of action. Held that until his former judgment was set aside he could not proceed. However, in that case the representatives of the deceased defendant elected to assent to the validity of the prior judgment. Case only holds that plaintiff who took judgment against dead defendant cannot sue executors on the same cause of action.

Stickney v. Davis, 17 Pick. 169 (Mass.)
Dictum — direct attack.

Representatives of a deceased defendant permitted to come in and vacate the judgment and be substituted.

Hildreth v. Thompson, 16 Mass. 191
In point — holding opposed to the texts.

Collateral attack in an action for rent. Plaintiff's title depended on judgment in another action rendered after defendant's death. Held that the judgment was utterly void and that plaintiff had no title and could not recover the rent.

Pourpore v. Stone & Ordean Wells Co., 132 Minn. 409, 157 N. W. 648
Dictum — party dead when action commenced.

Proceeding for widow's allowance was commenced after her death. The court having decided only the status of an order entered in such case, discussion of the situation where the party died after commencement of the action was dictum only.

Stocking v. Hanson, 22 Minn. 542
Dictum — estoppel of opposite party.

Representatives of a deceased party denied the right to

become parties to the proceeding on the ground that they were guilty of laches in presenting their application. Discussion of the question whether the judgment was void or voidable was not necessary to the decision.

Hayes v. Shaw, 20 Minn. 405
Distinguished — judgment in favor of deceased plaintiff.

Involved the additional proposition that it arose on demurrer to a petition which stated that the judgment had been duly given and made. The court held that the demurrer admitted that allegation. All discussion of the question void or voidable was unnecessary to the decision.

State v. Riley, 219 Mo. 667, 118 S. W. 647

Overruled by later Missouri decision, Cole v. Parker Co., 276 Mo. 220; 207 S. W. 749.

Kellogg v. Moore, 271 Mo. 189, 196 S. W. 15
Overruled by Cole case, supra.

Wardrob v. Leonard, 78 Nebr. 531, 111 N. W. 134, 126 Am. S. R. 619
Dictum — attack barred by statute of limitations.

Collateral attack on a decree of sale. Right to conduct the attack was barred by a Nebraska statute. Discussion of the question void or voidable unnecessary to the decision.

McCormick v. Paddock, 20 Nebr. 486, 30 N. W. 602
In point — supports the text.

McAlister v. Lancaster County Bank, 15 Nebr. 295, 18 N. W. 57
Distinguished — no issue of death involved.

Decree contested by an individual on theory he was insane when the decree was rendered and that no guardian appeared for him. Held the service of summons gave the court jurisdiction of him, sane or insane. If the decision is any authority at all, it would be authority for the discredited doctrine that a judgment is not void even though defendant was dead when the action was commenced.

Jennings v. Simpson, 12 Nebr. 558, 11 N. W. 880.
Distinguished — no judgment for or against dead defendant.

Collateral attack by an individual on an order which had disallowed his report as a receiver. His attack was based on the proposition that the plaintiff in the receivership action was dead when the order was entered. Court held that the order was an administrative matter and that the death of the plaintiff was immaterial.

Wood v. Watson, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541
Distinguished — judgment for dead defendant.

The court distinguishes clearly between a judgment against a dead defendant and a judgment in favor of a dead defendant. The court recognizes that there is a manifest reason why a judgment against a dead man may be avoided and set aside on the ground that the defendant having died there was no one to make a motion to revive the action or to substitute his representatives unless the plaintiff made that motion, and that the plaintiff, having failed to make the motion to substitute, cannot complain. The reason why an irregular judgment against a defendant can be complained of only by him is that he is presumed to be satisfied with the judgment unless he complains. It is otherwise, however, where he is dead at the time judgment is given because he cannot by any presumption be held to have assented to that judgment unless it was in his favor, in which event the Court considers that the defendant may safely be presumed to be satisfied with the judgment.

Therefore, the Court, while apparently holding that a judgment rendered after death is voidable only, carefully protects its decision against any unwarranted extension, and so rendered it is only authority for the proposition that a judgment in favor of a deceased defendant is not void, and it is not authority for the proposition that a judgment against a deceased defendant would be voidable only.

Knott v. Taylor, 99 N .C. 511, 6 S. E. 788, 6 Am. S. R. 547
In point — supports the text.

Lynn v. Lowe, 88 N. C. 478
Dictum — direct attack.

Decision only vacated judgment and substituted proper parties. Discusses the question of void and voidable at length, but not involved because the proceeding was a direct attack.

Burke v. Stokely, 65 N. C. 569
Dictum — direct attack.

Court sustains propriety of setting aside a judgment against a deceased defendant and permitting substitution of correct parties.

Swasey v. Antram, 24 Oh. St. 87
In point — supports the text.

Dows v. Harper, 6 Oh. 518, 27 Am. D. 270
Dictum — direct attack.

Jefferson v. Hicks, 33 Okla. 407, 126 P. 739
Dictum — direct attack.

This was not only a direct attack but the judgment in question was that of an appellate court which denied a motion to set aside that judgment and directed that the mandate be issued to the lower court and that the lower court take proper steps for revivor.

Mosley v. Southern Mfg. Co., 4 Okla. 492, 46 P. 508
In point — based on survival statute.

Collateral attack. Court squarely held that the judgment was voidable only, but the case is one where the cause of action clearly survived by virtue of the Oklahoma statute.

Mitchell v. Schoonover, 16 Or. 211, 17 P. 867, 8 Am. S. R. 282
Dictum — entry nunc pro tunc.

Approves of entry nunc pro tunc where case was submitted prior to death of plaintiff, and judgment thereafter rendered for him.

Murray v. Weigle, 118 Pa. 159, 11 Atl. 781
Distinguished — point not involved:

While this was a collateral attack on a judgment against a deceased defendant, the decision turned on the validity of proceedings in a guardianship which did not involve a judgment rendered after death.

Carr v. Townsend's Executors, 63 Pa. 202
Distinguished — judgment for a dead plaintiff.

Holding that the judgment was voidable only may be upheld on the theory that the defendant had assented to the entry by failing to suggest to the court the death of the plaintiff.

Yaple v. Titus, 41 Pa. 195, 80 Am. D. 604
Distinguished — judgment for or against a dead defendant not involved.

The judgment attacked was for the sale of property of a lunatic who died pending the sale proceedings. While the court discusses the validity of the order of sale the decision is based primarily on the proposition that the probate court had acquired jurisdiction of the property and that jurisdiction of the person of the insane man was not necessary to a valid sale and that the proceeding was one purely in rem.

Grossman's App., 102 Pa. 137
Dictum — direct attack.

Lanning v. Pawson, 38 Pa. 480
Dictum — direct attack.

At the request of a representative of a deceased defendant the court set aside a judgment entered on a warrant of attorney after the death of the party who signed the warrant.

Greenough v. Patton, 7 Watts 336 (Pa.)
Distinguished — does not involve the point.

Case merely holds that judgment against an executor by

name and without further proceeding is not a lien on the testator's real estate.

Warder v. Tainter, 4 Watts 270 (Pa.)
Dictum — point not involved.

In scire facias court held that jurisdiction of the person was not necessary and that the proceeding being one in rem the judgment on scire facias was voidable only.

Harrison v. McMurray, 71 Tex. 122, 8 S. W. 612
In point — Texas decision.

Howard v. McKenzie, 54 Tex. 171
In point — Texas decision.

McClelland v. Moore, 48 Tex. 355
In point — Texas decision.

Taylor v. Snow, 47 Tex. 462, 26 Am. S. R. 311
In point — Texas decision.

Milam County v. Robertson, 47 Tex. 222
In point — Texas decision.

Elliott v. Bastian, 11 Utah 452, 40 P. 713
Dictum — attack barred by limitation statute.

Court refused to modify or vacate a judgment on the ground that the time and method of attack was prescribed by statute, which had not been complied with, and said:

"It is unnecessary to discuss their (courts') power at common law or in the absence of statutory provisions."

Holt v. Thacher, 52 Vt. 592
Dictum — direct attack.

Ruling on a motion before judgment. Court permitted substitution of parties.

Neale v. Utz, 75 Va. 480
Distinguished — did not involve judgment against a deceased party.

Evans v. Spurgin, 11 Gratt. (52 Va.) 615, 6 Gratt. (47 Va.) 107, 52 Am. D. 105
Distinguished — did not squarely involve the question.

> Conflicting chains of title. Court held that claims under one chain of title were nullities because a common predecessor had first conveyed his title to the other chain. The court goes on to discuss a later judicial proceeding against the common predecessor and stated that those proceedings could not be attacked, but, having held that the common predecessor had previously conveyed his interest, the proceeding was therefore of no effect and discussion of it was unnecessary to the opinion.

Robinett v. Mitchell, 101 Va. 762, 45 S. E. 287, 99 Am. S. R. 928
In point — supports the text.

Alvis v. Saunders, 113 Va. 208, 74 S. E. 153
In point — supports the text.

King v. Burdell, 28 W. Va. 601, 57 Am. R. 687
In point — supports the text.

Watt v. Brockover, 35 W. Va. 323, 13 S. E. 1007, 29 Am. S. R. 811
Distinguished — judgment in favor of deceased plaintiff.

Hotchkin v. Bussell, 46 Wash. 7, 89 P. 183
Distinguished — decided on another point.

> Plaintiff assigned to one Collins her right to purchase water front property from the State of Washington. Her assignee, Collins, appealed from the ruling of the Land Department on the right to purchase the land. The appeal was decided against him after his death. Plaintiff then began this separate action to set aside the ruling on the appeal, alleging that the ruling on the appeal was void and that actually Collins had held her interest in trust for her. The Washington court refused to set aside the ruling and referred to the void-voidable rule, but did not base its decision on the ground that the ruling on appeal was voidable only, but decided the case on the proposition that even though the ruling was set aside plaintiff would have

no standing because her right had been assigned and her rights as beneficiary did not appear and that she had no legal title. The decision was also based on the same reasoning as applied in the case of Green v. Watkins, where the rule was recognized that death of a plaintiff in error does not abate an appeal.

Green v. Cobden, 4 Scott 486, 36 E. C. L. 398 (England)
Dictum judgment entered nunc pro tunc.

This is one of the early English decisions which determines that a judgment nunc pro tunc may be entered where the case was fully tried before death and held under advisement until after death, and the case has no application to a judgment entered as of a day after death.

We submit that the texts are grossly in error when they say that the numerical weight of authority is in favor of the proposition that a judgment is voidable only, even though rendered after death, where the court once had acquired jurisdiction of the defendant. We submit that nine of the courts have squarely held that such a judgment is void and that only six courts have squarely held to the contrary; that two of the courts have held that the judgment is only voidable but have based their decisions either on survival statutes or on a complete misconception of the jurisdiction of courts (Texas). All the remaining decisions are distinguishable in one of the respects noted above.

No. 449

E. W. CLARK,
As Receiver, Petitioner,

-vs-

HARRY O. WILLIARD, W. W. WHEATON,
C. W. HAY, as Trustees of Gordon Campbell-Kevin
Syndicate, a Common-Law Trust, and
CAMPBELL-KEVIN SYNDICATE, a
Law Trust,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

LOUIS P. DONOVAN
of Counsel,
Shelby, Montana.

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STATUTES AND CONSTITUTIONAL PROVISIONS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK,

As Receiver, Petitioner,

-vs-

HARRY O. WILLIARD, W. W. WHEATON, and C. W. HAY, as Trustees of Gordon Campbell-Kevin Syndicate, a Common-Law Trust, and GORDON CAMPBELL-KEVIN SYNDICATE, a Common-Law Trust,

Respondents.

STATEMENT

The Montana statutory provisions and Montana constitution as interpreted by the Supreme Court of Montana in this case (Record 69 to 77) continued the Federal Surety Company, an Iowa corporation, in existence for the purpose of being sued in the Montana courts by Montana creditors, notwithstanding its dissolution in the state of its domicile. Petitioner now challenges the validity of these statutory and constitutional provisions in Montana upon the ground that they in effect deny "full faith and credit" to the judgment rendered by the Iowa court dissolving the cor-

poration and to the Iowa statute providing for su
dissolution. In our opinion the case is ruled by and t
validity of the Montana statutory and constitution
provisions is upheld by the decision of this court
McGoon vs. Scales, 9 Wallace 23, 32, 19 L. Ed 54
548, wherein this court upheld the validity of a jud
ment rendered by a Wisconsin court against an Illino
corporation after its dissolution in the state of domici
and in the course of its opinion said:

"1. It is said that the bank was dead in law, a
that as the suit was instituted against the bank b
name, no jurisdiction was acquired.

It is by no means certain that the bank had n
capacity to sustain a suit, notwithstanding the ac
ceptation of its Charter and the transfer of its pro
erty to Trustees. * * *

2. The legislature of Wisconsin had made pro
vision by special statute for a case in which a bank
whose functions had ceased, but which yet owne
property and owed debts in Wisconsin, might b
sued and the property subjected to the payment o
those debts. The constitutionality of this act is de
nied; but no provision of the constitution of Wis
consin or of the United States is pointed out whic
is opposed to such legislation. It would, on the con
trary be a strange defect in the legislative powers if
under such circumstances, a state could not fram
laws which would enable her citizens to subject th

lands of a corporation whose Charter had expired to the debts which it owed to her citizens."

At the outset, however, we are met with the question of the jurisdiction of this court to issue its writ of certiorari to the Supreme Court of Montana in view of the fact that the validity of the Montana statutory and constitutional provisions, as so interpreted by the Supreme Court of Montana, was not challenged in the State court and furthermore, petitioner failed to make any proof in the State court as to what faith and credit the Iowa judgment of dissolution had in that state.

THE COURT IS WITHOUT JURISDICTION TO ISSUE THE WRIT OF CERTIORARI.

The application for the Writ of Certiorari herein is based upon Subd. (b) of Sec. 237 Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 344. This subdivision of the statute provides for the issuance of the Writ of Certiorari, in the court's discretion, in three classes of cases, viz., (1) where is drawn in question the validity of a treaty or statute of the United States; (2) where is drawn in question the validity of the statute of any state on the ground of its being repugnant to the treaties or laws of the United States; or (3) where any title, right, privilege or immunity is especially set up or claimed by either party under the constitution or any treaty or statute of or

commission held or authority exercised under the United States.

Obviously, the present case does not fall in the class of cases first mentioned in the statute. "The valdity of a treaty or statute of the United States" was not, in any manner, drawn in question in this case. No discussion of that clause of the statute is necessary; and we will proceed to a brief consideration of the other two clauses in Sec. 344, Title 28 U. S. C. A.

THIS IS NOT A CASE "WHERE IS DRAWN, IN QUESTION THE VALIDITY OF A STATUTE OF ANY STATE ON THE GROUND OF ITS BEING REPUGNANT TO THE CONSTITUTION, TREATIES, OR LAWS OF THE UNITED STATES."

The record shows that the decision of the Supreme Court of Montana rests entirely upon Secs. 6013 and 6059 of the Revised Codes of Montana, and Sec. 11 of Art. XV of the Constitution of Montana (R. 75-77). The effect of these statutory and constitutional provisions as interpreted by the Supreme Court of Montana is to continue in existence within the State of Montana a foreign corporation for the purpose of being sued, notwithstanding its dissolution in the jurisdiction of its domicile (R. 75-77). The interpretation thus placed upon these statutory and constitutional pro-

visions of Montana by the Supreme Court of that state are conclusive upon this court, and are not subject to review.

"The meaning attributed by the highest court of a state to a statute of the state must be accepted by the United States Supreme Court on review as though it had been specifically expressed in the statute."

Supreme Lodge etc. v. Myer, 265 U. S. 30, 44 Sup. Ct. 432, 68 L. Ed. 885.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107.

Atchison T. & S. F. Rr. Co. v. Railroad Commission of Calif., 283 U. S. 380, 51 Sup. Ct. 553, 75 L. Ed. 1128.

But the question of the validity of the state statute or constitutional provision as interpreted by the state Supreme Court, may be reviewed and determined by the Supreme Court of the United States, if the validity of the statute is drawn in question "on the ground of its being repugnant to the constitution, treaties or laws of the United States."

Sec. 344, Title 28 U. S. C. A.

But, in order to be entitled to have the question reviewed by this court, the petitioner for certiorari must show that the question of the validity of the state statute was raised in the state court "on the ground of its being repugnant to the Constitution, treaties or laws of the United States."

"In order to give the Supreme Court jurisdiction of a writ of error (or certiorari) to review a judgment which the highest court of a state has rendered in favor of the validity of a statute or an authority exercised under a state, the validity of the statute or authority must have been drawn in question on the ground of their being repugnant to the Constitution, laws or treaties of the United States. *Where no such ground has been presented to or considered by the courts of the state, the federal supreme court has no jurisdiction.*"

Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878.

See other cases cited in Note 111 to Sec. 344, Title 28 U. S. C. A.

Nowhere does the record show that the validity of Secs. 6013 and 6659 Revised Codes of Montana, or Sec. 11 of Art. XV of the Constitution of Montana, was questioned in the state court "on the ground of its being repugnant to the Constitution, treaties or laws of the United States." It, therefore, follows that the "validity" of these statutory and constitutional provisions of Montana cannot now be reviewed by this court. Since the interpretation of these statutory and constitutional provisions by the Supreme Court of the State is conclusive and, as so interpreted by the Supreme Court of Montana, the foreign corporation was continued in existence for the purpose of being sued

by Montana creditors, notwithstanding dissolution in the state of domicile, and its property was subject to levy of execution, there is no jurisdiction in this case for issuance of a writ of certiorari herein. Petitioner now seeks to challenge the "validity" of these statutory and constitutional provisions upon the ground that, as interpreted by the Supreme Court of Montana, they deny full faith and credit to the judgment of the Iowa court dissolving the corporation. But since the validity of the statutes and constitutional provisions was not raised in the state court, it cannot be raised here for the first time.

Nor was the "validity" of the Iowa statute in any manner questioned in the Montana courts. It was merely construed as being inapplicable to property situated within the State of Montana and the right of litigants to prosecute actions in the Montana courts. The Supreme Court of the State of Montana said:

> "The question of continuing actions by or against a corporation after its dissolution depends upon the laws of the state in which the action is pending and a foreign statute relating thereto is of no avail (R. 76). * * * Therefore, we hold that the suit of appellants against the surety company did not abate on the entry of dissolution in Iowa, and that the judgment entered herein is good and valid" (R. 77).

The mere construction of a foreign statute without

questioning its validity does not present a Federal question under Section 344 (b), Title 28 U. S. C. A.

Glenn v. Garth, 147 U. S. 360, 13 S. Ct. 350, 37 L. Ed. 203.

Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 35 S. Ct. 37, 59 L. Ed. 220.

Moreover, the inapplicability of the Iowa statute to actions pending in the Montana court was not based upon the ground that such statute was "repugnant to the treaties or laws of the United States."

We respectfully submit that the record does not show any question reviewable under the second clause in Subd. (b) of Sec. 344, Title 28 U. S. C. A. The Petition, therefore, should be dismissed.

THE CASE IS NOT ONE "WHERE ANY TITLE, RIGHT, PRIVILEGE OR IMMUNITY IS SPECIALLY SET UP OR CLAIMED BY EITHER PARTY UNDER THE CONSTITUTION OR ANY TREATY OR STATUTE OF, OR COMMISSION HELD, OR AUTHORITY EXERCISED UNDER THE UNITED STATES."

We assume for the purpose of argument that when a party asserts that full faith and credit have not been given to a judgment rendered by a court of a sister state, he asserts a "right * * * under the Constitution" of the United States.

Westside Belt R. Co. v. Pittsburgh Construction Co., 219 U. S. 32, 31 S. Ct. 196, 55 L. Ed. 107.

But the petitioner is not in a position to complain unless (1) the right so claimed "is specially set up or claimed" in the state court, and (2) the effect of the judgment in the state where rendered was duly pleaded and proved.

We respectfully submit that petitioner failed to claim his alleged "right" in the state court in both of these respects.

(a) The Answer filed by petitioner in the state district court (R. 15-21) contains no allegation or claim that either the Iowa statute or the Iowa judgment vested in petitioner the title or right to possession of the property of Federal Surety Company situated in Montana. On the contrary, petitioner's pleading indicates that he deemed himself to be an ordinary equity Receiver, and that his rights were limited to those conferred upon him by the court appointing him and to property situated within the jurisdiction in which he was appointed. He alleged that "he is the duly appointed, qualified and acting receiver of the defendant, Federal Surety Company of Davenport, Iowa, pursuant to the order of the District Court for the State of Iowa in and for Scott County" (R. 16), and that "the said court, acting through its clerk, issued to the undersigned Letters of Receivership" (R. 18), and he prayed for the appointment of an "ancillary receiver of all the

property, assets and effects of the above named defendants, Federal Surety Company of Davenport, Iowa, situated within this jurisdiction, to care for and preserve the same until the further order of this court, with all rights and powers usually granted to ancillary Receivers in such cases including the right and power to carry into force and effect the order of the original Court or jurisdiction." (R. 20-21).

These allegations are clearly inconsistent with the claim now made that petitioner became the statutory successor of Federal Surety Company on September 25, 1931, and vested with complete title and right of possession of all of its property, wheresoever situated, including the property situated within the State of Montana.

It is apparent that if Clark on September 25, 1931, became vested with the title and right of possession to the Montana property previously belonging to Federal Surety Company, the appointment of Crichton as ancillary Receiver of "the property, assets and effects of the above named defendant, Federal Surety Company" (R. 20-21) was a useless gesture meaning absolutely nothing; because, on the theory now urged by Petitioner, the Federal Surety Company had neither property, assets nor effects on the date of Crichton's appointment since all its former property had been vested in Clark some ten months previously thereto.

Attention is also directed to the fact that nowhere

in his Answer in the State court (R. 15-21) did petitioner make any reference to the full faith and credit clause of the Constitution nor did he allege or claim that the Iowa judgments, or either of them, were entitled to full faith or credit. He did not even allege in his pleading that the Iowa judgments were "duly given and made," as required by the Montana statute when a judgment is pleaded as a basis of a right.

Sec. 9169 Revised Codes of Montana 1921.

Failure to plead the Iowa judgments in the form prescribed by the statute, rendered the pleading insufficient insofar as any rights might be based upon such foreign judgments.

Mears v. Shaw, 32 Mont. 575, 81 Pac. 338.
Henderson v. Daniels, 62 Mont. 363, 205 Pac. 964.

We respectfully submit that petitioner wholly failed to "specially set up or claim" the rights now urged in his petition for certiorari herein that "your petitioner is the successor to said corporation and as such holds *title* to all property owned by said company at the time it so ceased to exist." (Petition, p. 3).

Furthermore, since the Montana statutes (Secs. 6013 and 6659 Revised Codes of Montana) and constitutional provision (Sec. 11, Art. XV Constitution of Montana) continued the foreign corporation in existence for the purpose of being sued, and subjected its property situated in Montana to levies under executions

issued upon judgments obtained after its dissolution in the state of domicile, and the rights now claimed by petitioner, if well-founded, would necessarily mean that these statutory and constitutional provisions are invalid, a proper setting up of petitioner's alleged "rights" in the state court would involve some character of pleading that the statutory and constitutional provisions of Montana which denies such rights, were invalid. Petitioner's failure to allege or claim that the Montana statutes and constitutional provisions conflicting with his alleged rights were invalid, was a failure to "specially set up or claim" the right now asserted.

(b) The full faith and credit clause of the constitution requires only that the judgment rendered by a court of a sister state be accorded the same faith and credit that it would have in the sister state. What faith and credit it is entitled to in the state where rendered, is determined by the law of that state.

> Hanley v. Donoghue, 116 U. S. 3, 6 S. Ct. 242 29 L. Ed 535.
>
> Gasquet v. Lapeyre, 242, U. S. 673, 37 S. Ct. 165, 61 L. Ed. 367.

It is, therefore, necessary to plead and prove the law of the foreign state in order to show what faith and credit the judgment is entitled to therein. The courts of Montana do not take judicial notice of the law of Iowa.

> American Savings Bank & Trust Co. v. Chapman, 61 Mont. 408, 202 Pac. 385.

M'Bain v. N. P. Ry. Co., 52 Mont. 578, 160 Pac. 654.

And it is, therefore, necessary to plead and prove the foreign law in order to ascertain what faith and credit the alleged judgments had in the State of Iowa.

American Savings Bank & Trust Co. v. Chapman, 61 Mont. 408, 202 Pac. 385.

This court has declared the same rule in a number of cases.

Gasquet v. Lapeyre, 242 U. S. 367, 37 S. Ct. 165, 61 L. Ed. 367.

Chicago etc. Ry. Co. v. Wiggins Ferry Co., 119 U. S. 622, 7 S. Ct. 398, 30 L. Ed. 519.

Hanley v. Donohue, 116 U. S. 1, 29 L. Ed. 535.

In the case first cited, Mr. Justice Van Devanter, speaking for the court, said:

"There are several reasons why this assignment affords no basis for a review here, but the statement of one will suffice. What the Constitution and the congressional enactment require is that a judgment of a court of one state, if founded upon adequate jurisdiction of the parties and subject-matter, shall be given the same faith and credit in a court of another state that it has by law or usage in the courts of the state of its rendition. This pre-supposes that the law or usage in the latter state will be brought to the attention of the court in the other state by appropriate allegation and proof, or in some other recognized mode; for the courts of one state are not

presumed to know, and therefore not bound to take judicial notice of, the laws or usage of another state (citing cases). *Here the law or usage in Tennessee, where the judgment was rendered, was not in any way brought to the attention of the Louisiana court, and therefore an essential step in invoking the full faith and credit clause was omitted.* In this situation the claim that the Louisiana court refused to give effect to that clause is so devoid of merit as to be frivolous."

Gasquet v. Lapeyre, 242 U. S. 367, 37 S. Ct. 165, 61 L. Ed. 367.

There is nothing in the record to show whether under the Iowa law the Iowa judgments are final or interlocutory merely. It is only a final judgment that is entitled to full faith and credit.

Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687.

See also:

Hoch v. Bryan, 230 N. W. 823, 180 Minn. 298.

Wolf v. Chicago M. St. P. & P. R. Co., 230 N. W. 826, 180 Minn. 310.

The record affirmatively shows that the Iowa court retained jurisdiction to make "further directions, orders or decrees as may be necessary or proper" (R. 26); and the exparte order made by the Iowa court on December 22, 1931, on application of the Receiver "for instructions and orders concerning his duty" (R. 26) shows that the court apparently felt at liberty to modify or

enlarge its previous decree (R. 26-31). If the Iowa court had jurisdiction on December 22, 1931, to modify its previous decree, it doubtless has the same jurisdiction still, and neither the decree of September 25, 1931 (R. 21-26), nor the order made December 22, 1931 (R. 26-31), can be deemed final.

Under the Montana statute an action is deemed pending from the time of its commencement until final determination on appeal, or until the time for appeal has passed.

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."
>
> Sec. 9821 Revised Codes of Montana 1921.
>
> Peterson v. City of Butte, 44 Mont. 129, 120 Pac. 231.

A judgment rendered in this state does not become final until determined on appeal, or until the time for appeal has passed.

> Noe v. Matlock, 64 Mont. 35, 208 Pac. 591.

There is nothing in the record to indicate what the period for appeal from the Iowa judgment under the Iowa law may be, nor is there anything to show whether or not an appeal has been taken.

Even if the Decree of September 25, 1931, be deemed a judgment for the immediate dissolution of the corporation (and we respectfully submit that it is not a

judgment of immediate dissolution), the corporation nevertheless had the right to appeal therefrom; and the decree would not be effective while the appeal was pending.

> State ex rel Attorney General v. Fidelity Loan & Trust Co., 113 Iowa 439, 85 N. W. 638.

And even without appeal being taken, the judgment would not be effective until the time for appeal expired, unless the corporation acquiesced in same.

> State ex rel Attorney General v. Fidelity Loan & Trust Co., 113 Iowa 439, 85 N. W. 638.

No proof was introduced in the trial court to show that appeal had not been taken, or that the time for taking appeal had expired.

We respectfully submit that the record does not show that either the decree of September 25, 1931 (R. 21-26), or the order of December 22, 1931 (R. 26-31), had become final or conclusive under the Iowa law.

Attention is also directed to the fact that the Iowa decree of September 25, 1931 (R. 21-26), was rendered in a default proceeding (R. 17), and that the only service upon the defendant surety company was an order to show cause "why its *business* should not be forthwith dissolved, and a receiver appointed to wind up its affairs" (R. 17). We submit that under an order to show cause of that character, the Iowa court had no jurisdiction to enter a decree *dissolving* the corporation, and that if the decree may be interpreted to be a decree

for the *dissolution* of the corporation, it is not responsive to the issue presented in the order to show cause and to that extent, it is entitled to no faith or credit. In discussing this point in the case of Reynolds v. Stockton, 140 U. S. 264, 11 S. Ct. 773, 35 L. Ed. 464, Mr. Justice Brewer said:

"Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other State in and of themselves require. It does not demand that a judgment rendered in a court of one State, without the jurisdiction of the person, shall be recognized by the courts of another State as valid, or that a judgment rendered by a court which has jurisdiction of the person, *but which is in no way responsive to the issues tendered by the pleadings* and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state."

Reynolds v. Stockton, 140 U. S. 264, 11 S. Ct. 773, 35 L. Ed. 464.

See also: 12 R. C. L. 114.

Folger v. Columbia Ins. Co., 99 Mass. 267, 96 Am. Dec. 474.

Olds v. City Trust Safe Deposit Co., 185 Mass. 500, 70 N. E. 1022, 102 A. S. R. 576.

"The final absolute order should be no broader than the rule or order to show cause."

15 Encyc. Plead. & Prac., 372.

Furthermore, the decree rendered by the Iowa court September 25, 1931, did not purport to *presently* dissolve the Federal Surety Company. The language of the judgment is that "defendant Federal Surety Company *shall be dissolved*, and its effects distributed" (R. 22). The auxiliary words "shall be" are the future tense of the verb and indicate action or effect to be taken or had in the future. The use of these words negatives any *present* dissolution of the corporation. It would be as reasonable to say that the decree effected an immediate distribution of assets of Federal Surety Company to creditors, as it is to claim that the decree effected an immediate dissolution of the corporation. The language used shows that the decree contemplated that the corporate effects would be "distributed" and the corporation would be "dissolved" at some future date. Nor can the effect of that decree be enlarged or extended by the ex parte order made December 22, 1931 (R. 26-31). No notice of any character was given of the receiver's application "for instructions and orders concerning his duty" (R. 26), and it is little short of absurd to say that the rights of respondents in this case or the title to property situated in Montana could be affected by that order.

> "The constitutional requirement that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state is necessarily to be interpreted in connection with

other provisions of the Constitution, *and therefore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law.*"

Old Wayne Mutual L. Assn. v. McDonough, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345.

See also:

Watmore v. Karrick, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

Since petitioner did not attempt to plead or prove what "faith and credit" the Iowa judgments were entitled to in the state of Iowa, he is not in a position to complain that the Iowa judgments were not accorded "full faith and credit" by the Supreme Court of Montana.

Nor can it be claimed that the Montana court failed to give full faith and credit to the Iowa *statute* relating to the winding up of insurance and surety companies. That statute does not of itself purport to vest in the state Insurance Commissioner the title to property of an insolvent Surety Company, even if such property is situated within the State. Still less, can it be claimed that the *statute* purports to transfer to the Insurance Commissioner property not situated within the State of Iowa. The interpretation placed upon this statute by the Supreme Court of Montana without questioning its validity and the Court's conclusion that

it does not have the effect of transferring to the Iowa Insurance Commissioner property of the insolvent corporation situated within the State of Montana, nor control the prosecution of actions in the Montana courts, is not a denial of the full faith and credit required by Sec. 1, Art. IV of the Constitution of the United States.

Allen v. Allegheny Co., 196 U. S. 458, 25 S. Ct. 311, 49 L. Ed. 551.

Glenn v. Garth, 147 U. S. 360.

Western Life Indemnity Co. v. Rupp, 235 U. S. 261.

In the case first cited, this court said in part:

"In several cases we have held that the construction of a statute of another state and its operation elsewhere did not necessarily involve a federal question. (citing cases). We have repeatedly held that the mere construction by a state court of a statute of another state, without questioning its validity, does not with possibly some exceptions, deny it the full faith and credit demanded by the statute in order to give this court jurisdiction."

Allen v. Allegheny Co., 196 U. S. 458, 25 S. Ct. 311, 49 L. Ed. 551.

Nor can the petitioner complain that full faith and credit was not accorded the Iowa judgment without allegation and proof in the state court that under the Iowa law these judgments were final, and not merely interlocutory.

Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687.

We respectfully submit that the record does not show that the petitioner was improperly denied any right under the Constitution of the United States, which was "specially set up or claimed by" him in the state court.

THE CASE DOES NOT PRESENT ANY FEDERAL QUESTION THAT IS WORTHY OF REVIEW BY THIS COURT.

Petitioner's Complaint herein is based upon the following propositions, both of which we submit are erroneous:

(1). That the Iowa proceedings dissolved the Federal Surety Company, and that the necessary effect thereof was to abate the actions pending against it in the Montana courts, and prohibit the Montana courts and Montana litigants from proceeding to judgment against it, notwithstanding the fact that the Montana constitution and statutes continued the corporation in existence for the purpose of being sued;

(2) That the Iowa proceedings had the effect of transferring title to property situated in Montana, notwithstanding the provisions of the Montana law to the contrary.

(1)

A corporation is a mere legal fiction, and exists only in contemplation of law. Chief Justice Marshall, fol-

lowing Lord Coke, said:

"A corporation is an artificial being, invisible, intangible, *and existing only in contemplation of law.*"

Dartmouth College v. Woodward, 4 Wheat (U. S.) 518, 4 L. Ed. 629.

1 Thompson on Corporations, Sec. 3.

Since a corporation is a legal entity "existing only in contemplation of law," it follows that whatever the Montana law contemplates to be a legal entity is in fact such. It is the contemplation of law that makes the legal entity or corporation and a state is at liberty to regard any individual, officer, group of persons or associations as a corporation, as it sees fit. Under the Montana constitution and statutes a foreign corporation coming into the state to do business, is contemplated to continue a corporation notwithstanding its dissolution in the state of domicile, and its property within the State of Montana may be charged with the payment of debts contracted in the transaction of its Montana business. No authority can be found which denies to a state this power to impose, upon a foreign corporation entering the state for the transaction of business, such conditions as it sees fit to impose, and to deem the corporation continued in existence for the purpose of enforcing payment of its obligations incurred in the transaction of its business within the state, notwithstanding proceedings for dissolution in other jurisdictions.

The question is fully discussed by the Supreme Court

of Iowa, in:

Schloss v. Metropolitan Surety Co., 149 Iowa 382, 128 N. W. 384.

To the same effect see:

Norris v. Lloyd, 183 Iowa 1056, 168 N. W. 557.

U. S. Truck Co. v. Penn Surety Co., 243 N. W. 311.

The rule applicable to foreign corporations, is stated in a general work as follows:

"The question of continuing or reviving actions by or against a corporation after its dissolution depends upon the laws of the state in which the action is pending, and a foreign statute relating thereto is of no avail."

1 C. J. 137.

"Domestic statutes continuing the existence of dissolved foreign corporations for the purpose of prosecuting and defending actions after they have been dissolved are effective to render valid judgments obtained in the state, so far as property in the state belonging to the foreign corporation is concerned."

14-A C. J. 1353.

In the case of U. S. Truck Co. vs. Penn. Surety Co., 259 Mich., 242, 243 N. W. 311, the Supreme Court of Michigan held that the decree of dissolution of a Pennsylvania corporation rendered by a Pennsylvania court, abated an action commenced in the State court of Michigan on the date of such dissolution; but the decision

was based strictly upon the ground that the Michigan statutes did not purport to continue a foreign corporation in existence for the purpose of suit and the court clearly indicated that if there were such statutory provisions in the State of Michigan they would be valid and the case could be prosecuted against the foreign corporation notwithstanding its dissolution in the jurisdiction of domicile. The court said:

"The statutes of this state recognize the finality of dissolution by providing for continuance of domestic corporations for a term of years for the purpose of certain actions and directing the manner of service. These statutes are not made to apply to foreign corporations either by language or as a condition of administration of the latter to do business in this state. *Perhaps our legislature should extend them to foreign corporations as has been done in other states.*" U. S. Truck Co. vs. Penn. Surety Co. 243 N. W. 311, 259 Michigan 242.

Attention is again directed to the language employed by this court in McGoon vs. Scales, supra, where this court declared the propriety and validity of such legislation and said:

"It would, on the contrary, be a strange defect in the legislative power if, under such circumstances, a state could not frame laws which would enable her citizens to subject the lands of a corporation whose Charter had expired to the debts which it owed to

her citizens." McGoon vs. Scales 9 Wallace 23, 19 Law Edition 545.

To the same effect see:

Life Assn. of America vs. Fassett, 102 Ill. 315.

Winger vs. Hutchinson 83 Ill. App. 675, 183 Ill. 606 56 N. E. 388, 75 A. S. R. 133; Castle vs. Acrogen Coal Co. 145 Kentucky 591, 140 S. W. 1034,

Stetson v. New Orleans City Bank, 2 Oh. St, 167, 12 Oh. St. 577,

Sturgis v. Vandervelt, 73 N. Y. 384,

Simmott v. Hamman, 141 N. Y. Supp. 505,

Rodgers v. Adriatic Fire Ins. Co., 148 N. Y. 34, 42 N. E. 515.

We respectfully submit that the Montana constitutional and statutory provisions continuing the foreign corporation in existence for the purpose of being sued, and subjecting its property situated within the State of Montana to levy of executions issued on such judgments, were within the power of the state to adopt and enact, and that the Iowa statutes or proceedings in the Iowa courts cannot operate to annul or defeat the Montana law in that regard.

(2)

THE IOWA COURT HAD NO JURISDICTION TO CONTROL THE DEVOLUTION OF PROPERTY SITUATED WITHIN THE STATE OF MONTANA, NOR THE RIGHT OF MONTANA

LITIGANTS TO PROSECUTE ACTIONS I
THE MONTANA COURT.

The devolution of property situated within the Sta
of Montana is governed exclusively by Montana la
The rule is stated in the general work as follows:

"The dominion of a state over personal proper
within its borders is complete and its right to reg
late its transfer and subject it to process and exec
tion in its own way and by its own laws is unque
tioned, though by a legal fiction generally recogniz
by comity personal property is supposed to adhere
the person of the owner and is usually considered
having no situs other than his domicile."

5 R. C. L. 927, and cases cited.

"All real or immovable property is exclusively su
ject to the laws of the country within which it is s
uated, and no interference with it by any other so
ereignty can be permitted. It, therefore, follows th
all matters concerning the title and disposition of re
property are determined by what is known as the l
loci rei sitae, which can alone prescribe the mode
which a title to it can pass from one person to a
other, or an interest therein of any sort can be gain
or lost; *and this is true* in the case of an attempt
transfer whether it be voluntary or involuntary."

5 R. C. L. p. 925, and cases cited.

In accordance with the above principles, it has be

held by the Supreme Court of the United States:

"That a conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states, it is given only such effect as the laws of such state permit, and that, in general, it must give way to the claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state. *Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under laws of the state where the property is actually situated.*"

Security Trust Co. v. Dodd et al., 173 U. S. 624, 19 S. Ct. 545, 43 L. Ed. 835.

See also: 5 R. C. L. 1026, Sec. 118, and cases cited.

Maconchy v. Delehanty, 14 Ariz. 366, 95 Pac. 109, 20 Ann. Cas. 1038, 17 L. R. A. (ns) 173, and Note.

In R. C. L. above cited, the rule is stated as follows:

"Bankruptcy or insolvency proceedings in one state have no effect of their own force on property situated in another state, and the receiver or assignee may not claim such property as a matter of right."

5 R. C. L. 1026, and cases cited.

In Clark v. Clark, 178 U. S. 186, 44 L. Ed 1028, 20 S. Ct. 873, the question was as to the effect to be given to a judgment rendered in the Supreme Court of South Carolina in the courts of the State of Connecticut re-

specting real estate situated in Connecticut, in regard to which the South Carolina court had held that a certain Will had worked an equitable conversion into personalty. This judgment the Connecticut court refused to follow. In upholding the position of the Connecticut court, this court said:

> "The proposition relied on therefore is this—although the court of last resort of Connecticut (declaring the law of the state) has held that the real estate in question had not become personal property by virtue of the Will of Mrs. Clark, nevertheless it should have decided to the contrary, because South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by Will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut where the real estate is situated, governed in this case."

In Fall v. Eastin, 215 U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65, this court held that a deed made by a master by order of the court in the State of Washington, in execution of a decree, where the court had jurisdiction of the parties, did not have any efficacy as to the title of real estate beyond the jurisdiction of the court. Therein the court announced the general rule that the disposition of real property, whether by deed or descent or otherwise, must be governed by the law of the state where

the property is situated, and said:

"This doctrine is entirely consistent with the provision of the Constitution of the United States which requires a judgment in any state to be given full faith and credit in the courts of every other state. *This provision does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim on the subject matter of the suit.*"

To the same effect see:

Schloss v. Metropolitan Surety Co., 149 Iowa 382, 128 N. W. 384;

U. S. Truck Co. v. Penn Surety Co., 259 Mich. 242, 243 N. W. 311.

Nor did the Iowa court have any jurisdiction or power to restrict the right of Montana litigants to prosecute actions in the Montana courts. Respondents herein had instituted their action against the Federal Surety Company January 15, 1925 (R. 45), more than six years prior to the commencement of the proceedings in the Iowa court. Their right to prosecute that action to judgment could not be restricted by decrees entered or orders made by the Iowa court in a proceeding to which they were not parties. The courts of one state are not required by Sec. 1 of Art. IV of the United States Constitution to give full faith and credit to a judgment obtained in the courts of another state against

a person who was not a party to the suit.

> Engelhard v. Schoeder (CCA N. J.), 278 F. 341, affirmed 42 S. Ct. 382, 258 U. S. 640, 66 L. Ed. 789.
>
> Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 29 S. Ct. 341, 53 L. Ed 605.
>
> Evans v. Illinois Surety Co., 140 N. E. 802, 319 Ill. 105.

The respondents herein were not parties to the proceeding against Federal Surety Company in the Iowa court, and had no notice thereof, and could not have appeared in that action and defended, even if they had been notified and desired to defend. It is still more obvious that the order entered by the Iowa court December 22, 1931 is not, in any manner, binding upon respondents, and could not in any manner affect their rights. That order (R. 26-31) is based upon the application of the Receiver "for instructions and orders concerning his duty" (R. 26). There was no adversary party and there was no notice given to the respondents or to any other person. The application of the Receiver "for instructions" did not present, and could not present, any issue of either law or fact. Any attempt upon the part of the District Court in that ex parte proceeding to adjudge and determine the rights of persons not parties to it was clearly beyond the jurisdiction of the court and outside of any issues presented by the application. An essential element of a judgment entitled to full faith and credit under the Constitution of the

United States is that it must have been obtained according to due process of law.

"No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party."

Scott v. McNeal, 154 U. S. 34, 46, 38 L. Ed. 896, 14 S. Ct. 1108.

"The constitutional requirement that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state is necessarily to be interpreted in connection with other provisions of the constitution, and therefore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in due process of law enjoined by the fundamental law."

Old Wayne Mutual Assn. v. McDonough, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345.

"It is a rule as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant until he has been duly cited to appear *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959.

See also:

Wetmore v. Karrick, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

Schloss v. Metropolitan Ins. Co., 149 Iowa 332, 128 N. W. 384.

U. S. Truck Co. v. Penn Surety Co., 259 Mich. 242, 243 N. W. 311.

The Iowa decrees lacked every element of due process of law insofar as they attempted to deprive respondents herein of their right to proceed with the prosecution of suits previously commenced in the Montana courts.

A STATUTORY RECEIVER HAS NO EXTRA-TERRITORIAL POWER UNLESS THERE IS A STATUTE VESTING HIM WITH TITLE TO THE PROPERTY, WHICH IOWA DOES NOT HAVE.

Counsel have cited, as an alleged construction of the operation of the Iowa Code provision applicable, State ex rel Attorney General v. Fidelity Loan & Trust Company, 85 N. W. 638, involving a decree appointing a receiver and dissolving that corporation. There, the decree ordered that "the Fidelity Loan & Trust Company *be and is hereby dissolved.*"

However, to give Clark the powers and rights contended for by petitioner, viz., that he shall be recognized in every state, there is a condition precedent, which the United States Supreme Court has held necessary, and

that is that the statute, itself in order to become a part of the charter of the corporation, must provide in direct terms that this statutory officer shall *become vested with the title to all* corporate assets.

In other words, Respondents are invoking the doctrine of Relf v. Rundle, 103 U. S. 222, 26 L. Ed. 357, and other cases based upon statutes *expressly so declaring*, and not upon statutes such as the one in question. (Tr. p. 31, Lines 26-29; Tr. p. 32, Lines 1-28).

Where such statutes as the Iowa statute are involved, the same court, in a large number of cases, and cases later than Relf v. Rundle, or any of the cases cited, has held that this power and right of the statutory Receiver does not exist and need not be recognized.

Thus, in Sterrett v. Second National Bank, 248 U. S. 73, 63 L. Ed. 135, the Court, in distinguishing Relf v. Rundle, and other cases relied on by Respondents, says:

> "Since the decision of this court in Booth v. Clark, 17 How. 322, 15 L. Ed. 164, it is the settled doctrine in Federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which he was appointed. The reasons for this rule were fully discussed in Booth v. Clark, and have been reiterated in later decisions of this court. Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. Rep. 244; Great

Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 575, 577, 49 L. Ed. 1163, 1168, 1169, 25 Sup. Ct. Rep. 770; Keatley v. Furey, 226 U. S. 309, 403, 57 L. Ed. 273, 275, 33 Sup. Ct. Rep. 121. This practice has become general in the courts of the United States and is a system well understood and followed. It permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered, and, if necessary, administered. The system established in Booth v. Clark has become the settled law of the Federal courts, and if the powers of chancery *receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation, and not from judicial action.* Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 577, 49 L. Ed. 1169, 25 Sup. Ct. Rep. 770.

"Counsel for petitioner insists that the case is not ruled by the doctrine of Booth v. Clark, and that under the Alabama statutes and the decisions of the supreme court of that state, *the title to the property of the Trust Company is vested in the receiver in such wise that he is authorized to sue for its recovery in the courts of a foreign jurisdiction.*

* * * * *

"The statutes do not undertake to vest in the receiver an estate in the property to be administered

for the benefit of creditors, as was the case in Bernheimer v. Converse, 206 U. S. 516, 534, 51 L. Ed. 1163, 1170, 27 Sup. Ct. Rep. 755, and Converse v. Hamilton, 224 U. S. 243, 257, 56 L. Ed. 749, 754, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292, in which the right to sue in the courts of a foreign jurisdiction was sustained."

The court will find the Alabama statute, therein construed, just as broad a statute as the Iowa statute.

See also:

Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380;

Great Western Min. & Mfg. Co. v. Harris 198 U. S. 561, 49 L. 3d 1163;

Keatley v. Furey, 226 U. S. 309, 57 L. Ed. 273;

Lyon Bonding Co. v. Koratz, 280 Fed. 532-538, and cases cited therein.

The cases cited by Petitioner have either been distinguished by the courts or are distinguishable.

Bernheimer v. Converse and Converse v. Hamilton, the two United States Supreme Court decisions, are distinguished in Sterrett v. Second National Bank, 63 L. Ed 135, as the quotation therefrom shows.

The Iowa doctrine on this subject of discussion is Schloss v. Metropolitan Surety Co., 128 N. W. 382, 149 Iowa 382, distinguishing Relf vs. Rundle and, because the Receiver was not vested by statute with the title, the Court, in that case, said:

"It must be borne in mind that the Receiver here

defending is simply a receiver of an insolvent company who is, by the corporation laws of New York, authorized to collect the debts, preserve the property and distribute the assets of the company among its creditors, we fail to see how any receiver thus provided for can, in this state, as against the established rule of our law, take the company's assets found in this state, and seized for the plaintiff in an attachment proceeding, out of our state, without satisfying the valid claim of the attaching creditor, and compel him to resort to the courts of New York for the purpose of securing payment of such claim."

And in the same decision, the Iowa Court distinguishes Parsons v. Charter Oak Ins. Co., 31 Fed 305, by saying:

"*Without acceding to the soundness of the reasoning employed* in deciding that case, it is sufficient to say that the case before us is not analogous, for plaintiff's rights as against this defendant company were determined by contract, and contract alone, and those substantive rights are not to be affected, as we think, by statutory provisions of New York with reference to the method in which the company may be wound up."

Mere receivership, it has uniformly been held, is not sufficient to authorize the receiver to go into foreign jurisdictions and contest with local creditors.

Booth v. Clark, 17 How. (U. S.) 322, 15 L. Ed. 164;

Homer v. Barr Pumping Engine Co. 180 Mass. 163, 91 Am. St. Rep. 269, 61 N. E. 883;

Re: Benedict, 140 Fed. 55;

In Re: Dunseath & Son Co., 168 Fed. 973;

Neither does a receiver become vested with any title or estate to the property.

Thompson v. Phoenix Ins. Co., 136 U. S. 287, 34 L. Ed. 408;

State v. Yellowstone County, 50 Mont. 259, 146 Pac. 539;

53 C. J. 96, Sec. 119;

As we have seen, to have any effect in this case, the authority must come from a statute and not from a judicial decree, it is only of academic importance as to where the title rests after a decree of dissolution.

An examination of the Iowa decree entered September 25, 1931 (Record 21 to 26), shows clearly that Clark is a mere equity receiver and derives his entire power from the decree of the court and the court remains in full charge of the administration of the estate. The receiver was required "to file an inventory of all property" (Record 23). He was directed "to sell all of the property and assets" (Record 24) "at public auction" (Record 25) but "no sale by the receiver of the properties of defendant company shall be valid until the receiver shall make report thereof and file such report with the clerk of this court and present such

report for approval and confirmation to some Judge this court (Record 25). This provision of the dec negatives petitioner's claim that he was vested w title, because a party vested with title would be a to transfer same by his own account. He was requir "to file a bond in this court as receiver (Record 2 * * * whereupon rights of receivership shall issue him" (Record 26). All of these provisions indic that the petitioner herein was a mere equity receiv entirely controlled by the court, deriving all of powers from the decree of the court, and none of powers from the statute. The statute further confir this conclusion because it contains absolutely no dir tions as to how the receiver shall proceed to wind the corporation affairs and does not in any man purport to define either his powers or his duties. is inconceivable that the legislature of the State Iowa would vest the title of the insolvent corporati in the receiver and leave him wholly unguided a uncontrolled by any statutory provisions as to his dut or manner of performing them.

We respectfully submit that neither the Iowa stat nor the Iowa decree of September 25, 1931, vest petitioner with any greater power or authority th that possessed by the ordinary equity receiver. As the order of December 22, 1931, we have heretof shown that the court had no jurisdiction to enter a judgment or order in that proceeding which would

any manner affect the rights of third parties.

NONE OF THE CASES CITED BY PETITIONER ARE IN POINT AND ARE EASILY DISTINGUISHED.

All of the cases cited by petitioner in support of his petition are distinguished from the case at bar in this, that in none of them was there a statutory provision in the state of the former which expressly or by judicial interpretation continued the foreign corporation in existence for the purpose of being sued by local creditors. For illustration, Oklahoma Natural Gas Co. vs. Oklahoma, 273 U. S. 257, extensively quoted from by petitioner is far from holding that an Oklahoma survival statute would have been invalid. The court examined that statute and found it inapplicable because it applied only to corporations dissolved by action of court and in commenting upon the fact, said:

> "There is nothing to indicate why the company was dissolved. We may assume but we do not know, that it was in anticipation of its dissolution by force of law."

It seems manifest that had Oklahoma an applicable statute the case would have been ruled in harmony with the other American authorities cited and quoted herein.

We therefore respectfully submit that insofar as this case involves any federal question, the decision of the

FILE COPY

SUPREME COURT
OF THE
UNITED STATES

Case No. 449

October Term, 1933

E. W. CLARK,
as Receiver,

Petitioner,

versus

HARRY O. WILLIARD, W. W. WHEATON,
and C. H. RAY, as Trustees of Gordon
Campbell-Kevin Syndicate, a Common-Law Trust,
and GORDON CAMPBELL-KEVIN SYNDICATE,
a Common Law Trust,

Respondents.

Supplemental Brief of Respondents

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NATURE OF THE CAUSE.

As we view the question before this Court, there is involved an essentially different legal situation than is stated by petitioner in his supplemental brief.

Heretofore respondents filed their brief in opposition to the granting of the writ of certiorari herein, based, as they viewed the matter, upon the questions of jurisdiction of this court. The questions of jurisdiction were so intimately interwoven

with questions which would arise on the merits, that undoubtedly the Court felt constrained to hear the case upon its merits which would not necessarily preclude a re-examination of the jurisdictional questions.

FURTHER STATEMENT OF THE CASE.

To correctly understand the precise situation of the parties it is important at this juncture to direct specifically to the attention of the Court, that the action in which Respondents judgment was recovered, was an action entirely distinct from the proceeding of Mieyr versus Federal Surety Company (P. 49 to 63 inclusive), all as appears set forth in the judgment roll in the latter proceeding.

The record before this Court (R. 59) shows that the amended Complaint (R. 49 to 59 inclusive), was filed January 31, 1928.

The Answer itself was filed February 29, 1928 (R. 60). The obvious fact is that the action was instituted sometime prior to January 31, 1928. The defendant,—then admittedly sui juris,—by its general appearance and answer (R. 59) vested the District Court of the Tenth Judicial District for Fergus County, with jurisdiction. If that court ever lost jurisdiction of the case, it lost it because of the subsequent dissolution of the defendant, Federal Surety Company, therein. That it did not lose jurisdiction is clear from a consideration of the following propositions of law:

I.

THE REMEDIAL LAW OF MONTANA CONTROLLED THE PROCEEDINGS IN THE DISTRICT COURT OF THE TENTH DISTRICT FROM THE TIME JURISDICTION WAS OBTAINED UNTIL JUDGMENT WAS ENTERED.

This Court has held that questions of procedure and prac-

tice are questions to be determined by the Court of the forum.

There is no clause in the Constitution which restrains the right in each state to legislate upon the remedy in suits on judgments of other states exclusive of all interference with their merits. Bacon v. Howard, 20 How. 25, 15 L. Ed. 811.

We shall very seriously controvert the contentions of petitioner that the corporation occupied the status of a deceased person in Montana.

But for the purpose of this argument, let it be assumed that the corporation was dead in Iowa.

II.

THERE WAS NO PLEA IN ABATEMENT NOR ANY SUGGESTION OF A REASON FOR ABATEMENT OF THE ACTION WHICH RESULTED IN RESPONDENTS OBTAINING THEIR JUDGMENT AGAINST FEDERAL SURETY COMPANY.

The suggestion of that alleged fact was never made to the District Court of the Tenth Judicial District for Fergus County, Montana. No attempt was made by the Federal Surety Company or its Counsel in that action to direct attention of the District Court to even the fact that Federal Surety Company was involved in a proceeding for the appointment of a Receiver and dissolution (R. 49).

On the day when the judgment was entered (R. 60), Messrs. Ayers & Ayers appearing as Counsel for Federal Surety Company, did not apprise the Court of the alleged dissolution, or alleged want of capacity of Federal Surety Company, but simply informed the Court that they were not ready for trial; a matter addressed to the discretion of the court under proper rules of law. Under those circumstances the judgment entered was a valid judgment.

It is settled by the great weight of authority that:

"The general rule is that, where jurisdiction of the parties to an action, has duly attached, the fact that one of them died before the rendition of the judgment, that fact not appearing of record, does not make the judgment absolutely void, so as to permit its impeachment in a collateral proceeding."

34 C. J. 555;
See also 34 C. J. 292, Sec. 507.

In 33 C. J. 1107, it is said:

"But the great preponderance of authority is to the effect that where the Court has acquired jurisdiction of the subject matter, and the person during the lifetime of the party, a judgment rendered for or against him, after his death, although erroneous and liable to be set aside, is not void or open to collateral attack."

See also:

15 R. C. L. 618, Sec. 58.

In 1 C. J. 137, it is said:

"The question of continuing or reviving actions by or against a corporation, after its dissolution, depends upon the laws of the state in which the action is pending, and a foreign statute relating thereto is of no avail."

In 1 C. J. 137, 138, it is said:

"As a rule, defects and objections as to the action or proceeding or as to parties which do not bar the same, but good merely in abatement, as shown in the preceding sections, to be available, must be pleaded or otherwise properly presented to the Court, or they will be waived."

The general rule, which is supported by cases from practically all jurisdictions, is well stated in 34 C. J. 520, Sec. 827:

"A direct attack on a judgment is an attempt to avoid or correct it, in some manner provided by law, in a proceeding instituted for that very purpose, in the same action and in the same court, and the fact that other incidental relief is also asked is immaterial. Such is a motion or other proceeding to vacate, annul, cancel or set aside the judgment. A direct action to impeach and avoid the judgment, a motion in arrest of judgment, for a rehearing or for a new trial, or any proceeding to review it in an appellate court, whether by appeal, error, or certiorari,

action to review, bill of review or writ of review. * * * Where the element of fraud or mistake is involved in the issue, it is the general rule that the attack is direct. A collateral attack is an attempt to impeach the judgment by matters dehors the record, in an action other than in which it is rendered; an attempt to avoid, defeat or evade it, or deny its force and effect in some incidental proceeding not provided by law for the express purpose of attacking it; any proceeding which is not instituted for the express purpose of annulling, correcting or modifying such decree."

III.

WHEN RESPONDENTS PETITIONED THE DISTRICT COURT OF THE EIGHTH DISTRICT FOR LEAVE TO LEVY IT WAS ONLY IN AID OF EXECUTION. THE PROCEEDING IN BEHALF OF THE MOTION SHOWS THIS WAS DONE AS A PRECAUTIONARY MEASURE, AND WITH THE SUGGESTION OF THE BELIEF THAT THE EIGHTH DISTRICT COURT HAD NO JURISDICTION IN THE ACTION TO APPOINT A RECEIVER (R. 13).

In 34 C. J. 522, Sec. 828, it is said:

"A proceeding to enforce a judgment is collateral to the judgment, and therefore no inquiry into its regularity or validity can be permitted in such a proceeding, whether it is a direct action on the judgment, * * * or proceeding supplementary to execution, or bill in equity in aid of execution, or to enforce the lien of the judgment. * * *"

Again, it is said, in 34 C. J. 523, Sec. 829:

"According to some decisions, a suit in equity to enjoin or set aside a judgment constitutes a direct attack upon it; according to others, such a proceeding is collateral, unless fraud is alleged; while still others hold to neither the one or the other, but is properly designated an indirect attack. * * * If an injunction only is sought, the suit is a collateral attack, but if Plaintiff seeks also to have the judgment set aside, and the case retried on the merits, it is a direct attack * * *. An application for a writ of prohibition to forbid the Court to enforce its judgment is a collateral attack. * * * A motion to quash an execution is a collateral attack upon the judgment on which it is

based, unless the ground of attack is that the judgmen was obtained by fraud. * * * The validity or correctness o a judgment cannot be impeached in a subsequent actio brought by the former Defendant against the forme Plaintiff, involving the same issues, or in an action to re cover back the money paid, under the judgment, or fo fraud and conspiracy in obtaining the judgment."

Also, in 34 C. J. 525, it is said:

"The rule forbidding the collateral impeachment o judgments applies to all persons who were parties to th action in which the judgment was rendered, and to a those who are in privity with them."

On the subject of what constitutes privity, 34 C. J. 101 Sec. 1432, is supported by all authority:

"Privity means a mutual or successive relationship t the same rights of property, and within the rules relatin to the conclusiveness of judgments, all persons are privie to a judgment whose succession to the rights were de rived through or under one or the other of the parties t the action, and accrued subsequent to the commencemen of that suit."

If petitioner Clark is not in privity with Federal Surety Company it would be difficult to define his status.

O'Sullivan v. Douglas, 124 Ky. 243; 98 S. W. 99

At the time the judgment (R. 61-62) was rendered in favo of respondents, there was pending in another District Court i Montana, to-wit, in the District Court of the Eighth Judicia District in and for the County of Cascade, the action of Miey versus Federal Surety Company of Davenport, and E. W Clark, as Receiver of Federal Surety Company of Davenport Iowa, for the appointment of a receiver. That action so entitled was instituted on or about the 25th day of March, 1932 (R. 8 9). IT DID NOT INCLUDE THESE RESPONDENTS AS PARTIES. Since the writ of certiorari has issued herein, and the record has been brought into this court, it will be seen tha the action brought by Mieyr in the Eighth District and which the Supreme Court of Montana held was a nullity (Mieyr v

Federal Surety Co., 23 Pac. (2d) 959), did not involve these respondents. These respondents, after securing their judgment, in no wise subject to collateral attack, as we have seen, petitioned the District Court of the Eighth District for leave to levy (R. 11-12).

The minutes of the Eighth District Court (R. 13) declare:

> "No evidence was submitted other than as contained in the petition for Leave to Levy filed by Petitioners, but it was stated to the Court that the judgment obtained by the Petitioners against Federal Surety Company on the 20th day of May, 1932, was made without knowledge of the receivership proceedings in Iowa; that so far as the local Receiver was concerned, D. A. Crichton, they felt that no jurisdiction had been obtained whereby he could make any claim to the money sought to be levied upon and moreover that he had not, as yet, done so; that the action in making levy was valid and unimpeachable but that in order to save any argument, concerning the matter, it was desired to have the leave of Court requested."

It can plainly be seen that respondents entered that court as a matter of respect and to avoid the possibility of a claim of contempt. They did not become parties to the action. Their position as set forth in the minutes, was fully justified by the later decision of the Montana court. That portion of the Montana Court's opinion declaring that Mieyr's complaint did not give the Court jurisdiction, is not attacked by petitioner here, nor, we submit, is it subject to attack. AT THAT TIME, THE TIME RESPONDENT'S JUDGMENT WAS ENTERED, PETITIONER, CLARK, AS ONE OF THE DEFENDANTS IN THE ACTION INSTITUTED BY MIEYR, WAS OPPOSING MIEYR'S APPLICATION FOR THE APPOINTMENT OF A RECEIVER (R. 10).

Concurrently with the granting of Leave to Levy, the Court overruled Clark's resistance (R. 11). Thereupon Clark evi-

dently determined to assert his claims by answer. (R. 15-21).

On July 25th, 1932, notice was served upon respondents that Mieyr would move the Court on August 3rd for an annulment of the Order Granting Leave to Levy (R. 14-15), and the Eighth District Court then entered its decree in accordance with the prayer of Clark's answer (R. 34-39).

Thereupon these respondents because the court in its decree revoked the order granting leave to levy (R. Par. 12, pp. 38-39), again entered the case with a motion to vacate the order and decree, asserting inter alia (R. 40):

> "2. That the Court was without jurisdiction to appoint a receiver in said action."

And in support of said motion, filed an affidavit (R. 44-48), and set up the judgment obtained in the Tenth District, by copy of the judgment roll (R. 49-62). On appeal by respondents to the Supreme Court of Montana, their contention that the proceeding in the District Court of the Eighth District WAS WITHOUT JURISDICTIONAL FOUNDATION, WAS UPHELD. How, under these circumstances, any foundation was laid for the claim that a question arose which could invoke the jurisdiction of this court, is beyond comprehension. The judgment of respondents was not directly attacked, nor was its validity or effect even indirectly challenged (R. 14-15).

The record speaks that Counsel for respondents in the Eighth District Court, at the time the Motion to Set Aside the Order Granting Leave to Levy, was heard, asked to be enlightened as to the ground of the motion and were told by opposing counsel that the order of May 24th above set forth granting the right * * * to levy executions, was void (R. 15).

It is true that petitioner asserted in his answer, as against his adversary Mieyr, the rights claimed under the constitution

of the United States; but, in a proceeding where no jurisdiction was reposed, as was ultimately determined by the Supreme Court of Montana. That the full faith and credit clause of the Constitution can be asserted only in accordance with local rules of procedure, is settled beyond controversy.

34 C. J. 1107, reading:

> "An action founded on a judgment of a sister state must be governed by the rules of pleading and practice prevailing where such action is brought, subject to the qualification that the procedure obtaining in the latter state cannot impair the efficacy of a judgment of a sister state, or deny an adequate remedy for the enforcement."

The Supreme Court of Montana did not deny full faith and credit to the Iowa decrees and statutes, nor were those rights ever, except abortively, asserted. Their assertion in a proceeding that failed to give the Court jurisdiction, was merely academic.

It must be borne in mind that the respondents were trustees of a Montana Common Law Trust (R. 49). They made no appearance in the Iowa Court, nor was the judgment therein binding upon them or the Trust.

32 C. J. 917.

Security Sav. Etc. Co. v. Rogers, 6 Idaho 526; 57 Pac. 316.

Smith v. Winchester, 96 Me. 480; 52 Atl. 1017; 90 Am. St. Rep. 414.

Met. Rub. Co. v. Place, 147 Fed. 90.

When they applied (R. 11-12) as a matter of caution (R. 13) to the District Court of the Eighth District for leave to levy, they did not enter a proceeding by Clark to enforce his judgment. At that time, he, like respondents, was contending that the Eighth District Court in Montana had no jurisdiction (R. 10). That motion had been submitted and was denied concurrently with the granting of leave to levy (R. 10).

The Supreme Court held that there was no jurisdiction to appopint a receiver given by Mieyr's complaint.

Respondents occupy the position of simply protecting their rights, all in an orderly and proper manner, out of respect for the courts. The analogies of the cases digsted in note 33 (b), 32 C. J. 916, can be easily applied here.

IV.

ARGUMENT ON THE MERITS.

Up to this point in our argument we have presented important and we think controlling, matters for the consideration of this Court. We think the record in the case precludes the examination of the question of graver import presented in the brief of petitioner. Nevertheless, to meet the contentions of petitioner, as we believe they can be met on the merits, we shall present those principles and authorities which we believe correctly resolve the question to be derived from the assumed facts of the situation set forth in petitioner's brief.

V.

THE RULE THAT LEGISLATURES MAY IMPOSE ANY RESTRICTIONS THEY MAY SEE FIT ON ADMITTING CORPORATIONS TO DO BUSINESS WITHIN THE STATE, FINDS ITS MOST LIBERAL EXTENSION IN CASES OF FOREIGN INSURANCE COMPANIES.

An insurance corporation is not engaged in interstate commerce.

Paul v. Virginia, 8 Wall. 168; 19 L. Ed. 357.
Ducat v. Chicago, 10 Wall. 410; 19 L. Ed. 972;
Liverpool & L. Life & F. Ins. Co. v. Mass. (Liverpool & L. Life & F. Ins. Co. v. Oliver), 10 Wall. 566; 19 L. Ed. 1029.
Home Ins. Co. v. Augusta, 93 U. S. 116; 23 L. Ed. 825.
People v. Thurber, 13 Ill. 544.

Farmers & M. Ins. Co. v. Harrah, 47 Ind. 236.
List v. Com., 118 Pa. 322; I Inters. Com. Rep. 784; 12 Atl. 277.
State v. Phipps, 50 Kan. 609; 18 L. R. A. 657; 34 Am. St. Rep. 152; 4 Inters. Com. Rep. 299; 31 Pac. 1097.

And in State ex rel Richards v. Ackerman, 24 L. R. A. 298, after citing these authorities the Court said:

> "Therefore, to insurance companies the general doctrine fully applies, that a state may exclude a foreign corporation, or impose upon it, as a condition of doing business, any burdens or restrictions that it chooses, reasonable or unreasonable."

See also Herbring v. Lee, 126 Or. 588; 269 Pac. 236; 60 A. L. R. 1165-70.

A State as a general rule may admit a corporation upon any condition it may see fit to impose.

In 6 Enc. U. S. Sup. Ct. Dec. 308, it is said:

> "A corporation created by one state cannot, with some exceptions, do business in another state without the latter's consent, express or implied, with certain limited exceptions, namely, federal corporations or agencies, and corporations engaged in interstate or foreign commerce. And it may discriminate between its own corporations and those of other states, or foreign countries."

While the decisions, including those of this court, have spoken broadly upon this subject; and this and other Courts, narrowing the question, have spoken specifically on the question at hand, petitioner still debates whether the imposition of conditions can go so far as to affect the situation after dissolution of the corporation in the State of its domicile.

In 17 Fletcher Cyc. Corp., Sec. 8318, it said:

> "Generally speaking, a corporation does not take with it into a sister state, either the general legislation or the judicial decisions of the state of its creation, and such laws and decisions have no extraterritorial operation or force."

At an early day this Court, in McGoon vs. Scales, 9 Wall. 23; 19 L. Ed. 545-548, in discussing an act of the State of Wis-

consin which sanctioned a proceeding against a corporation dissolved in Illinois, the State of its domicile, said:

> "The constitutionality of this act is denied; but no provision of the Constitution of Wisconsin or of the United States is pointed out which is opposed to such legislation. It would, on the contrary, be a strange defect in the legislative powers if, under such circumstances, a state could not frame laws which would enable her citizens to subject the lands of a corporation whose charter had expired, to the debts which it owed to her citizens."

After all, it is a matter of local procedure, and law. Viewed from any scientific standpoint, it would seem obvious that it is within the province of a state to determine what actions shall abate or be revived, and the manner of abatement or revival.

The decisions of the Montana Court, in the case sought to be reviewed, settles the question as to what does or does not abate in cases of this character. Generally speaking, a Legislature has the power to authorize the continuance of suits by or against a corporation after its dissolution.

1 C. J. 136.

In most of the states, if not in all, the common law rule that pending actions by or against a corporation are abated by its dissolution, is now avoided by statutes either continuing the existence of a corporation for a certain time after dissolution by expiration of its charter or otherwise, or by providing for the continuance of pending actions either as originally instituted, or through substitution of other persons. This subject is fully treated in the annotations to

Houston v. Utah Lake, Land, Water & Power Co.,
55 Utah 393, 187 Pac. 174; 47 A. L. R. 1288.

The annotations to the last cited case succintly set forth the law of the various states and are embraced in p. 1288 to 1569.

In some instances statutes enacted for the regulation of

domestic corporations have been held insufficiently explicit to embrace foreign corporations. Thus, the annotator derives the law from all American cases on the subject.

47 A. L. R. 1564.

"Statutes which operate so as to prolong corporate existence, have, in several states, been held inapplicable to foreign corporations; but the Kentucky enactment has been declared to be applicable to foreign corporations having their principal place of business in that state."

"The Ohio enactment preventing the abatement of actions has been treated as controlling with regard to foreign corporations. The scope of an enactment may, of course, be extended to foreign corporations by explicit words, contained either in the enactment itself, or in some other statute. Whether such an extension should be predicated, is a matter to be determined from the language used by the Legislature."

In 1 C. J. 137, it is said:

"The question of continuing or reviving actions by or against a corporation after its dissolution depends upon the laws of the state in which the action is pending, and a foreign statute relating thereto is of no avail."

VI.

IF THE STATUTE PERMITS ACTIONS TO BE CONTINUED FOR OR AGAINST THE CORPORATION BY NAME, THERE NEED BE NO SUBSTITUTION OF PARTIES.

There need be no substitution of parties, unless the statute requires substitution. Clearly it is within the province of a legislature to so declare.

Kipp v. Miller, 47 Colo. 598, 108 Pac. 164;
Steinhauer v. Colmar, 11 Colo. App. 495, 55 Pac. 293;
Lucifer Coal Co. v. Buster, 64 Colo. 179, 171 Pac. 61;
Hazard v. Park, 294 Fed. 40;
Townsend v. Delaware Glue Co., 12 Del. Ch. 25, 103 Atl. 577;
Big Sespe Oil Co. v. Cochran, 276 Fed. 216;

Dixie Mfg. Co. v. Ricks, 153 Ga. 364, 112 S. E. 370;
Finger & T. Stone Co. v. Hutchinson, 176 Ill. 48, 51 N. E. 622;
12 R. C. L. 114.

VII.

DOCTRINE OF RELFE V. RUNDLE IS A CAREFULLY LIMITED ONE. FOR OBVIOUS REASONS, IT HAS NOT BEEN EXTENDED IN ITS APPLICATION TO CASES NOT FALLING CLEARLY WITHIN THE RULE. WHAT ARE THE LIMITATIONS TO ITS APPLICATION?

Petitioner has cited and insists upon the application of the rule of Relfe vs. Rundle, 103 U. S. 222; and of Converse vs. Hamilton, 224 U. S. 243; and like cases. Those cases apply only where there is (a), a statutory receiver; (b), appointed by law; (c), deriving title through a statute; and (d), not through a chancery decree; and (e), where the dissolved corporation was not restrained or controlled by a statute of the foreign state where it applied for admission and was admitted. To that end we shall endeavor to work out the rule applicable to the specific facts in this case, and thereby show a clear differentiation between those cases so cited, and the case at bar. Moreover, we shall show the Court the true rule which this and other courts have applied to similar, if not identical cases.

Relfe v. Rundle states an undeniable doctrine where there are no statutory limitations, that:

> "Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home; but every person who deals with it everywhere it bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

That this statement is general and would apply and was

there applied to a case involving a set of facts unaffected by other important principles will be obvious upon the most superficial examination.

For instance, no constitutional right would be violated by the exercise of visitorial power in a foreign state; the rule rests upon expediency.

Williams vs. Gaylord, 186 U. S. 157; 46 L. Ed. 1102.

Likewise the "death" of a corporation, in its legal aspect, invokes only a rule of expediency.

Montana, or any other state may, as a condition upon which a foreign corporation is admitted to do business, declare that causes of action, maintainable against the corporation by name, shall survive dissolution. By such statute the corporate life, a mere fiction, is not legislated upon.

VIII.

MONTANA HAS NOT UNDERTAKEN TO SAY THAT A DISSOLVED FOREIGN CORPORATION IS ALIVE IN MONTANA. IT HAS ONLY SAID THAT IT REMAINS SUABLE.

In the sense that it is inherently impossible to breathe again the breath of life into a dead person or a dissolved corporation, an attempt to so do by legislation would appear incongrous. Nevertheless, it is neither incongrous, nor does it involve any constitutional right to declare that rights and remedies shall survive and be unaffected by either the death of a natural person or the dissolution (death) of a corporation.

In Rogers v. Adriatic Fire Insurance Co., 148 N. Y. 34; 42 N. E. 515, the Court of Appeals of New York said:

> "That the foreign corporation, dissolved and dead in the domicile of its origin, should be deemed alive in the foreign state so far as to save the remedies of its own citizens against property within its own jurisdiction, is entirely possible and not at all unreasonable."

This is true, upon the death of a non-resident defendant.

1 C. J. 230, Sec. 480.

This is true upon the dissolution of a foreign corporation (47 A. L. R. pp. 1557 to 1565, partly inclusive).

The general rule, applicable in the United States, is well stated in 12 C. J. 464, which reads:

> "Where, however, the place of domicile and of the act or contract are not the same, there has been some divergence in the authorities as to the proper law to govern. The continental writers incline to the view that the personal status of an individual, including his capacity to act or to contract, accompanies him wherever he may go, and that the law of his domicile will control no matter where he may be; and there are English and American authorities which have followed this rule, but the weight of the common-law authorities is to the effect that, in case of a conflict between the lex domicilii and lex loci contractus aut actus, the latter will prevail. In the United States practical necessity, arising from the great freedom of commercial intercourse between the several states of the Union, would, in the absence of all other reasons, seem to prevent a general adoption of the continental rule. In order to avoid the apparent anomaly resulting from the courts of a state giving validity to the act of a party done abroad, where they would refuse to enforce such act if it was done within the state, it has been suggested that the enforcement of the foreign law might readily be restricted by a positive prohibition of statute."

As an artificial being it may have and exercise only those rights and powers conferred upon it by the general law of its creator.

14 C. J. 51, Sec. 3.

When this artificial creature migrates, in the only way it can migrate, into another state, it does so under the rules of private international law, is subject to those rules of procedure prescribed by the rules of Conflict of Laws, just as is a natural person. Moreover, where there is an express statute of the state into which it migrates imposing conditions under which it shall operate and do business, it falls under restrictions

which might not be valid if applied to natural persons.

No constitutional provision would be involved or violated should any Legislature enact a provision fixing the status of a natural person, or declaring the effect of his death, or survivorship. When such statute is found, not only pertaining to a foreign corporation, but expressly assented to by it, there is an A PRIORI reason behind the validity of the Montana Constitution and Act.

See Fink v. National Union Fire Ins. Co., 90 S. C. 544; 74 S. E. 33; Ann. Cas. 1913 D. 221.

In 6 Enc. U. S. Sup. Ct. Dec. 313 it is said:

> "A state may impose upon a foreign corporation, as a condition to coming into or doing business within its territory, any terms, conditions and restrictions, which it may think proper, that are not repugnant to the constitution or laws of the United States. For the absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the state. And its right is subject to the condition of obeying the lawful regulations of the state, of which all persons dealing with the corporation are presumed to have constructive notice."

While the facts in Relf vs. Rundle are easily distinguishable from the case at bar, the doctrine therein announced has been refused application in other cases where the law of the forum was different.

Mutual Life Ins. Co. v. Cohen, 179 U. S. 262; 45 L. Ed. 181.

IX.

THERE IS NOTHING INHERENTLY INCONGROUS IN A STATE PROVIDING BY STATUTE THAT A FOREIGN CORPORATION SHALL REMAIN SUBJECT TO SUIT INDEFINITELY UNTIL ITS CONTRACTS HAVE BEEN PERFORMED. THE MONTANA STATUTE IS VALID.

The text writers who have examined the entire subject find

nothing inconsistent in the holdings of the various courts to the effect that a state may lawfully consider that a corporation may still be proceeded against and its property subjected to the claim of creditors even though dissolved in the state of its domicile.

In Fletchers Enc. of Corp., Vol. 8, p. 9720, it is said:

> "The legislature of a state may provide that a foreign corporation which has been dissolved, but which owns property and owes debts in such state, may be sued and the property subjected to the payment of such debts. Such legislation was held to be constitutional by the Supreme Court of the United States, which said: 'The constitutionality of this act is denied; but no provision of the Constitution of Wisconsin or of the United States is pointed out which is opposed to such legislation. It would, on the contrary, be a strange defect in the legislative power if, under such circumstances, a state could not frame laws which would enable her citizens to subject the lands of a corporation whose charter had expired to the debts which it owed to her citizens.' Under a constitutional provision that no foreign corporation shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar domestic corporations, it is held that a foreign corporation, when it comes into the state for the transaction of business, subjects itself to all of the laws of the state applicable to domestic corporations, and this same rule of equality continues, with the same rights and liabilities that attach to a domestic corporation, not only during the life of the foreign corporation transacting business in the state, but until its affairs have been settled upon its dissolution," citing McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545.

The following courts have expressed themselves in like manner upon the subject:

Stetson v. New Orleans City Bank, 2 Ohio St. 167; 12 Ohio St. 577;

Hauger v. International Trading Co., 184 Ky. 794; 214 S. W. 436;

Singer v. Hutchinson, 83 Ill. App. 675; 183 Ill. 606; 75 Am. St. Rep. 133; 56 N. E. 388;

Castle v. Acrogen Coal Co., 145 Ky. 591; 140 S. W. 1034;

Olds v. City Trust etc. Co., 185 Mass. 500; 70 N. E. 1022; 102 Am. St. Rep. 355;

Rogers v. Adriatic Fire Ins. Co., 148 N. Y. 34; 42 N. E. 515;

Life Ass'n v. Fassett, 102 Ill. 315;

Singer v. Hutchinson, 83 Ill. App. 675 (affirmed 183 Ill. 606, 56 N. E. 388; 75 A. S. R. 133).

The doctrine of Relf v. Rundle, and all related cases has no application where, as here, the Receiver is a mere chancery receiver.

On the score of the full faith and credit clause, the case admits of the clearest analysis.

Let us assume for the purpose of argument that the Iowa statutes authorize and the Iowa decree decides that the corporation is dead, and that Clark properly appeared in the action pending in Fergus County and properly invoked the full faith and credit clause,—conditions not present in this case, and to that plea the Montana Constitution and Montana Statute, as construed by the Court, were invoked. This is stating the case strong enough; yet, still the Iowa Statutes and the Iowa decree will not be permitted to ride down the Montana law.

It would be a strange application of ethics to permit a corporation to come into the state, assent to such constitutional and statutory provisions and then insist upon the paramount authority of the foreign decree and statute.

Andrews v. Andrews, 188 U. S. 14; 47 L. Ed. 366.

X.

THE IOWA COURT, AT THE TIME OF PRONOUNCING JUDGMENT RECOGNIZED THAT JUDGMENTS MIGHT BE ENTERED WHICH WOULD NOT BE SUBJECT TO COLLATERAL ATTACK, UNLESS SUITABLE PLEAS IN ABATEMENT BE FILED.

Clark was not precluded by the Iowa judgment,—at least

ACCORDING TO THE EX PARTE ORDER OF DECEMBER 22, 1931,—(R. 26-31), from appearing and presenting to the Tenth District Court of Fergus County, a plea, in abatement, for he was therein told (R. 30) "That E. W. Clark, Receiver, * * * be, and he is hereby given leave in his discretion to appear, specially, or as may be necessary, in any action wherein Federal Surety is named as defendant, for the purpose of presenting a plea in abatement, motion to dismiss, or motion to quash," etc.

The Iowa Court thereby RECOGNIZED THAT SUCH PROCEDURE MIGHT BE NECESSARY. Had Clark appeared with a plea in abatement in that action, he would have been met, as far as Montana is concerned, successfully with the contention that when Federal Surety Company came into Montana, it agreed that it would be bound by Montana law both substantive and adjective; and that the action must proceed to a judgment as instituted. Having been appointed in September, 1931 (R. 21) he could not have been ignorant of the pendency of the action. Due notice of the setting of the case for trial in May, 1932, was given. Counsel originally employed were permitted to be retained therein, and it is not a rank presumption to indulge that Clark had actual notice of the pending trial. No substitution was necessary. Had his plea in abatement been presented therein, and he had been aggrieved by the decision against him, then he at least could have had standing to present the constitutional question,—which he now has, we submit, no foundation for presenting to this Court.

XI.

AN ANALYSIS OF PETITIONERS' AUTHORITIES, SHOWING THEIR INAPPLICABILITY TO THE FACTS IN THIS RECORD.

We shall now analyze petitioners' authorities with the object of showing that they are not in point.

Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 337.

The outstanding features of this case are:

1. Life Association of America was incorporated under the laws of and domiciled in Missouri. A large judgment was ordered against it, giving occasion for Relf, the Insurance Commissioner of Missouri, to invoke the dissolution provisions of the Missouri statutes:

(a) Providing for the institution by him of an action for dissolution and the appointment of the Insurance Commissioner as statutory agent; and

(b) It was provided by statute that upon judgment of dissolution

> "All assets * * * shall vest in fee simple and absolutely in the Superintendent of the Insurance Department * * * who shall hold and dispose of the same for the use and benefit of the creditors," etc.

2. Process in the action in Louisiana out of which the decision arose, WAS SERVED AFTER the dissolution proceedings were begun in the Missouri Court.

3. There was no law of Louisiana, such as obtains in Montana, with respect to the right to sue the corporate entity after dissolution.

4. This court carefully recognized that the rule which it applied, the correctness of which cannot be denied, was unaffected by any statutory limitations in Louisiana, for it was said:

> "No state need allow the corporations of other states to do business within its jurisdiction unless it chooses * *; but if it does, without limitations express or implied, the corporation comes in as it has been created—"

Kinsler v. Casualty Company, 103 Nebr. 382; 172 N. W. 33.

This is easily distinguishable from the case at bar. There was no Nebraska statute cited by the court which imposed any limitation on the Corporation when it came into the State; and, on coming in,

> "It expressly reserved the right to have its affairs and all property interests adjudicated with reference to the Insurance Commissioner of New York."

By statute in New York, upon dissolution the property was vested in the Insurance Commissioner. Statutes of Iowa cited:

Section 8402 (R. 27) contains this peculiar provision concerning a dissolution suit:

> "Reserving, however, to the stockholders and creditors all rights now possessed by them."

Section 8964 (R. 27-28) provides that the Court, under certain circumstances, "SHALL DECREE A DISSOLUTION OF SAID COMPANY AND A DISTRIBUTION OF ITS EFFECTS, AND APPOINT A RECEIVER THEREFOR."

Sec. 8613, C. 1 (R. 28) which was enacted in 1929, provides that the Commissioner of Insurance "henceforth shall be the receiver and/or liquidating officer for any insurance company," etc. We reserve a more extended discussion of this statute for a later place in this Brief.

Further analyzing the decisions cited, it appears in:

> State v. Fidelity Loan Co., 113 Iowa 439; 85 N. W. 638;

that the sections of the Code 1040 and 4113 there construed by the court do not seem to be those obtaining at the time of the decree now in question. However, further than stating the common-law rule as to the effect of dissolution, which everyone concedes, it has no bearing on this case.

> Remington v. Samona Bay Co., 140 Mass. 494; 5 N. E. 292,

is clearly not in point.

No statute of Massachusetts was brought into controversy purporting to extend corporate life, OR DECLARING, that notwithstanding dissolution, the corporation was still suable.

Marion Phosphate Co. v. Perry, 74 Fed. 425.

The decision was rested upon the very obvious fact that the Florida statutes extending corporate life were not aimed at, and did not apply to foreign corporations, the Court saying:

> "These last quoted sections indicate that there was no purpose in the act to in anywise treat foreign corporations doing business in the state as Florida corporations."

In Felts v. Natl. Life Ass'n, 130 Ala. 413; 30 S. 374,

The Court simply holds that the statute of survivorship was enacted solely to govern domestic corporations, and does not apply to foreign corporations.

Okla. Natural Gas Co. v. Okla., 273 U. S. 257; 71 L. Ed. 634,

is in no sense, authority for the petitioner. The court simply held that under the record it could not be ascertained whether liquidating Trustees had been appointed as contemplated by statute. The Court seemed to recognize that the statute would if the facts permitted its application, extend the corporate life. No foreign statute was involved. A domestic corporation was under consideration.

Ridell v. Rochester German Ins. Co., 35 R. I. 45; 85 Atl. 273.

This case simply holds in line with several other American courts that the statute of Rhode Island was designed to apply to domestic and not foreign corporations.

Gulledge Bros. L. Co. v. Wenatchee Land Co., 115 Minn. 488; 132 N. W. 992.

This case is very simple. A dissolved Washington corporation undertook to maintain an action in Minnesota. IT WAS MET BY A PLEA IN ABATEMENT.

Conceding the truth of the plea, plaintiff applied for and had appointed, a receiver, and then asked that he be substituted as plaintiff. The right of substitution was denied because, upon dissolution, under Washington Statutes, title to the corporate property vests in the Trustees. The Court held:

> "Such being the situation and status of the corporate property, no right to any part thereof became vested in the receivers appointed by the Court below, and they can have no right to be substituted as parties to the action."

Consistent with other cases, the Court held that the Minnesota statute extending corporate life was enacted solely to regulate domestic corporations, and, of course would not apply to a foreign corporation.

The text of Thompson on Corporations, being based upon these decisions (3rd Ed. 40), like a stream, can rise no higher than its source.

> Morgan v. N. Y. Natl. Bldg. & Loan Assn., 73 Conn. 151; 46 Atl. 877,

is, we submit, not in point.

> McRae v. Kansas City Piano Co., 69 Kan. 457; 77 Pac. 94;

simply holds that in the absence of a statute continuing the corporate entity for the purpose of suit, dissolution abates action. The Court said:

> "It is only in virtue of some statute authorizing it * * * that these results may be avoided, or pending proceedings may be further prosecuted, or judgments already rendered, enforced."

Both the Kansas and Missouri statutes (Missouri being the state of domicile and Kansas the foreign), were examined to find an applicable survival statute.

> In First National Bank of Selma v. Colby, 21 Wall. 609; 22 L. Ed. 687,

suit was brought against a dissolved National Bank. ON A

PLEA IN ABATEMENT, the Court held that the action abated because there was no survivorship statute, saying:

> "This is the rule with regard to all corporations whose chartered existence has come to an end * * * unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution."

That the Court seriously considered the law of the forum as applicable, is apparent from the use of this language: "No such enactment is found in the Act of Congress * * * NOR IS THERE ANY PROVISION ELSEWHERE."

Combes v. Milwaukee & M. Ry Co., 89 Wis. 297; 62 N. W. 89,

the Court considered the case as presenting a common law question. No survivor statute was involved nor any mention made of one.

Muma v. Potomac Co., 8 Pet. 284; 8 L. Ed. 945.

A PLEA IN ABATEMENT was very properly sustained because of the dissolution of the defendant corporation. No survival statutes were involved:

Venable v. Granite Co., 135 Ga. 508; 69 S. E. 822; 32 L. R. A. (NS) 446.

No saving statute was involved, and the common law rule prevailed. The Court makes special mention of the probable effect of a saving statute, in these words:

> "It has been held in many cases that, if a corporation becomes extinct pending a suit to which it is a party, the suit thereby abates as to such corporation, and any judgment thereafter rendered against it is a nullity, unless some provision is made for the further prosecution of the suit by the laws of the state in which the suit is pending."

In Pendleton v. Russell, 144 U. S. 640; 36 L. Ed. 574.

No survival statute was involved. The Court very properly applied the common law rule.

Roche v. McDonald, 275 U. S. 449; 72 L. Ed. 365,

concerns the full faith and credit clause. It announces no new nor any applicable principle. Neither does

Converse v. Hamilton, 224 U. S. 243; 56 L. Ed. 749.

The Court in that case said:

> "True, the full faith and credit clause of the Constitution is not without well recognized exceptions, as is pointed out in Huntington v. Attrill, 146 U. S. 657; 36 L. Ed. 1123; Andrews v. Andrews, 188 U. S. 14; 47 L. Ed. 366; and Natl. Ex. Bank v. Wiley, 195 U. S. 257; 49 L. Ed. 184."

In Hancock Natl. Bank v. Farnum, 176 U. S. 640; 44 L. Ed. 619,

the Court held that a stockholder was a privy of a bank, and that a judgment against the bank was a judgment against and binding upon a stockholder, to which full faith and credit must be given. We fail to find any application of its principles to the case at bar.

XII.

THE STATUTE OF IOWA DID NOT VEST TITLE IN CLARK.

In Vol. 1, Clark on Receivers (2nd Ed.) p. 463, the learned author says:

> "The statutes of many states specifically authorize the appointment of a receiver of corporations * * *. These statutes frequently provide that when a receiver is appointed under such statutes, such receiver obtains not only possession of the property, and (but) legal title to the same, and, having this legal title, such receiver is thereby able to go into a foreign jurisdiction and sue in the courts of such foreign jurisdiction * * *. Some statutes go farther and provide that an ordinary equitable receiver of a corporation, or of individuals or of a partnership, shall be vested with title to the property."

Again in Vol. 1, Clark on Receivers (2nd Ed.), Sec. 341, it is said:

> "A receiver has no title to the fund, but simply acts as the arm of the court. In the absence of some conveyance (or) a statute vesting the property of the debtor in him, he cannot sue in the courts of a foreign jurisdiction."

See also Vol. 1, Clark on Receivers (2nd Ed.), Sec. 346.

Upon an examination of these authorities it will be ascertained that the statute must specifically and not impliedly grant the title.

An examination of the Legislative Act found in the Iowa Code as Sec. 8613, C-1 as set forth in petitioners brief, discloses that it became effective April 9, 1929. The title to that act reads:

> An act making "The Insurance Commissioner of the State of Iowa the Receiver or Liquidating Officer for Insurance Companies, Associations or Insurance Carriers."

Since the title of the act would not indicate any intent to vest the receiver with title, the argument that there is an implication falls without force.

In Clark on Receivers (2nd Ed.) Vol. 1, p. 181, Sec. 146, it is said:

> "Statutes which abrogate or abridge chancery courts generally are to be strictly construed, and if the restrictive purpose is not clear it will not be extended by construction."

For an application of all of these principles see

> Zacher v. Fed. Trust & Safety Valve Co., 106 Fed. 593.

Therein was involved the Connecticut statute.

Relfe v. Rundle is clearly distinguished and the Court declared that in the absence of a statute vesting title, the receiver became a mere equity receiver.

See also Clark on Receivers (2nd Ed.), Vol. 1, pp. 811-12-13.

The question may be asked as to where title is reposed.

In Vol. 1 Clark on Receivers, Sec. 347 (2nd Ed.) the learned author suggests that it may be a little difficult to determine exactly where title reposes, but it is suggested that the court has dominion over the property, and can order its disposition.

It would seem immaterial as to just where the title is reposed. Of course it must be understood that the court may by its decree, invest an equity receiver with title, but unless that is pursuant to a statute, the receiver does not thereby obtain extraterritorial authority.

Cases distinguishing Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 357;

In Sterrett v. Second Nat'l Bank, 248 U. S. 73; 63 L. Ed. 135,

the Court analyzes many of the decisions handed down by this Court up to that date, and declares that the doctrine of the Sterrett case has been the doctrine of this Court since the decision in Booth v. Clark, 17 How. 322; 16 L. Ed. 164.

Other decisions of this Court on the subject are:

Hale v. Allinson, 188 U. S. 56; 47 L. Ed. 380;
Great Western Minn. & Mfg. Co. v. Harris, 198 U. S. 561; 49 L. Ed. 1163;
Keatley v. Furey, 226 U. S. 399; 57 L. Ed. 273.

In Sterrett v. Second National Bank, 248 U. S. 73; 63 L. Ed. 135, the Court had under consideration a statute of Alabama in order to ascertain therefrom whether or not that statute would cast the case under the doctrine of Booth v. Clark, 17 How. 322; 15 L. Ed. 164, or under the doctrine of Relfe v. Rundle, 103 U. S. 222; 26 L. Ed. 357, and quoted therefor in the discussion of the Alabama statute. We submit that the decision is conclusive of this case.

Let us compare the Iowa Code provisions relied upon, with those of Alabama so construed by the Court. The Iowa Code provides that if certain conditions prerequisite are presented: "It, or he (the Court or Judge) shall decree a dissolution of said Company and a distribution of its effects, and appoint a receiver therefor."

Sec. 8964, Iowa Code set forth (R. 4).

The Alabama statute under consideration in the Sterrett case reads:

> "Shall appoint a receiver of all the books, property and assets of the corporation * * * (who) shall, under the direction of the Court, collect all debts due the corporation and sell all the property, real and personal, of the corporation, pay the debts thereof ratable or in full, as the funds realized may admit, and divide the residue after the debts and costs are paid," etc.

The next section of the Alabama Code considered by the Court reads:

> "* * * The Court * * * may appoint a receiver of all the property and assets of the corporation (who) under the direction of the Court must exercise the same powers and perform the same duties as are required of receivers in the next preceding section, and otherwise manage the affairs of the corporation pending final settlement thereof, as the Court shall direct."

Of the two acts, the Alabama act would more nearly accomplish the result contended for by petitioner, than the Iowa act; and this Court said that the conclusion was not warranted "that title is vested in the receiver as assignee or as statutory successor of the insolvent corporation in such wise as to authorize the action to recover in a foreign jurisdiction. * * * The statutes do not undertake to vest in the receiver, an estate in the property to be administered for the benefit of creditors."

That the Iowa District Court has not given this statute the breadth contended for, is apparent from a reading of the decree (R. 21-26).

The Court must approve and control the discretion of the receiver (Par. 10, R. 24-25). No sale is valid until the receiver report such sale to the Court and have the same confirmed (Par. 12, R. 25).

The alleged decree of December 22nd, 1931 (R. 26-31)

which petitioner dignifies as a decree, but which the Court itself declares is an "order as to suits and contracts in which Federal Surety Company was or is alleged to be a party," was entered without notice and ex parte, on the 22nd day of December, 1931, and can have no force whatever.

In Booth v. Clark, 17 How. 322, 15 L. Ed. 164,

the very limitations made by the Iowa decree of September 25 (R. 21-26), as we have called them to the attention of the Court supra, were sufficient for this Court to declare that the receiver there under consideration was a mere equity receiver.

The Court said:

> "Whatever may be the operation of the decree in respect to the receiver's powers over the property of the debtor within the state of New York, and his right to sue for them there, we do not find anything in the cases in the New York reports showing the receiver's right to represent the creditor or creditors of the debtor in a foreign jurisdiction."

Commenting upon his granted authority the Court further says:

> "He is a representative of the Court, and may by its direction, take into his possession every kind of property * * *; but it is not considered in every case that the right to the possession is transferred by his appointment * * *. When appointed, very little discretion is allowed to him, for he must apply to the Court for liberty to bring or defend actions, to let the estate, and in most cases, to let out moneys * * *."

In Hale v. Allinson, 188 U. S. 56; 47 L. Ed. 380,

the Court had under consideration whether or not a Minnesota receiver was vested with title under the statute authorizing the Court to "appoint a receiver of the same," and held that it did not operate to vest him with title. Commenting upon the statute and of the decisions of Minnesota, the Court said:

> "This language would seem to indicate that there is nothing in the statute which prevents a receiver from

maintaining an action in a foreign state. There is no holding that the statute itself provides in terms for such an action, or empowers a receiver to maintain it, or that it transfers any title in the fund to him."

Again the Court says:

"It seems also entirely clear that the receiver provided for in Section 5906 of above quoted statute, while not the receiver mentioned in Section 5897, is yet simply one to be appointed in aid of the court * * * if the court chooses to appoint him."

In Keatly v. Furey, 226 U. S. 399; 57 L. Ed. 273, the Court had under consideration a statute of West Virginia providing for the receiver taking, "charge of," and administering the assets, and for the bringing of suit and the conveyance of property in the corporate name thereafter.

The Court, in commenting on it said:

"It seems, to be sure, that in September and October, the local West Virginia Court purported to authorize and confirm a deed by a special commissioner to the receiver, but if the statute did not in itself constitute the receiver the universal successor of the corporation (See Chipman v. Mfg. Nat. Bank, 156 Mass. 147-149, 30 N. E. 610), it may be doubted whether the deed had extraterritorial effect. See Fall v. Eastin, 215 U. S. 1; 54 L. Ed. 65; 23 L. R. A. (NS) 924 * * *. The argument is strong to support the judgment of the court below, if no title passed."

Learned Counsel for petitioner in their brief, page 45, after indicating that there may be a doubt as to the effect of this decree declare "to imply a transfer of the title to the Iowa Commissioner essential to carrying out, the trust imposed on him by the statute, is but the application of an axiom well known to the law of trusts."

The decisions of this Court would seem to be a complete answer to that suggestion. The statute itself, contemplates a mere equity receiver.

The judgment which petitioner has under attack, appears in the judgment roll regular in every respect (Tr. 49-64). As

opposed to that judgment there is a record which fails to disclose wherein any Court having jurisdiction, ever passed upon the points made the basis of petitioner's contention at this time.

XIII.

ONLY ONE JUDGMENT OF THE IOWA COURT.

Learned Counsel seemed to find it important to dignify both the decree of the Iowa Court entered on the 25th day of September, 1931 (R. 21-26), and the "order as to suits and contracts to which Federal Surety Company was or is alleged to be a party," made on the 22nd day of December, 1931, as DECREES.

The latter is in no sense a decree and does not rise to any dignity whatever further than in harmony with the label placed upon it. It would not be indulging too strong a presumption to say that it was quite apparent to Receiver Clark and his Counsel from a consideration of the two sections of the Iowa Code (R. 27-28), that clearly Section 8964 of the Iowa Code of 1927, did not rise to a dignity sufficient to permit the application of the doctrine of Relfe versus Rundle, and that it was necessary to spread something upon the record which would make it appear that the Court had acted under, not only that section, but under Section 8613, C 1, and in a manner different than the plain phrasing of the decree of September 25th, 1931, would warrant. It must have been perceived that the provisions of the latter section, being in the alternative, should have been judicially exercised in order that a contention such as is made here, could be plausibly presented.

We must strenuously object to the classification of this ex parte order made without process, being dignified as a judgment or decree to which any faith or credit whatsoever must

be given.

While the Court might have power to amend a judgment if suitable steps, including due notice were shown to have been taken, the judgment would not even be amendable to include something which the Court might have had jurisdiction to insert therein, but failed so to do. It will be seen that under any construction of the Iowa statute, the Court would not have had authority to insert what is embodied in the ex parte order of December 22nd, 1931.

Freeman on Judgments (5th Ed.) Vol. 1, Sec. 141 says:

> "The general power to correct clerical errors and omissions does not authorize the Court to repair its own inaction, to make the record and judgment say what the Court did not adjudge, although it had a clear right to do so. The Court cannot, under the guise of correcting its record, put upon it an order or judgment it never made or rendered, or add something to either which was not originally included, although it might or should have ordered or adjudged in the first instance. It cannot thus repair its own lapses or omissions to do what it could legally and properly have done at the right time."

We do not concede that had the Court in its decree designated Clark as Liquidating Officer, it would have made any difference in view of what we shall presently present. It is sufficient to say that when carefully analyzed, this later ex parte order affords the only color for petitioner's argument.

The following authorities will bear upon a consideration of a proper construction of both the decree and this ex parte order. The decree is not phrased in words of the present tense. This is one of the requisites of a valid judgment.

C. M. Co. v. M. O. P. Co., 27 Mont. 152; 69 Pac. 714.

It is contrary to all approved forms of judgment.

33 C. J. 1192.

The only authority of the Iowa statute was to require the Federal Surety Company, "to show cause why its business

shall not be dissolved."

We are obliged to give strained construction to this statute to work out from it any warrant of authority to dissolve the corporation, and appoint any other than a Chancery Receiver, whether either of the statutes relied upon by petitioner is considered. The dissolution of a business would appear to be something quite different from the dissolution of the corporation itself. See 14-a C. J. 1120. The giving of full faith and credit is not a one sided requirement. Petitioner Clark assumes the right to ask this Court to ride down the Montana Constitution and statutes quoted in the opinion of the Montana Court.

Section 6212 Revised Codes of Montana, 1921, after requiring a foreign insurance company to make an appointment of a service agent in Montana by power of attorney, declares:

> "Said power of attorney shall stipulate and agree on the part of the company, corporation, or association that any lawful process against the same which is served on said attorney shall be of the same legal force and validity as if served on the company, corporation or association, and that the authority shall continue in force so long as the certificate of membership, policy, or liability remains outstanding against the company, corporation or association in this state."

Singer & Talcott Stone Co. v. Hutchinson, 176 Ill. 48; 51 N. E. 622.

Illinois, it seems has two statutes; one continuing corporate capacity of a dissolved corporation for two years, "for the sole purpose only of collecting the debts due to said corporation, and selling and conveying the property and effects thereof."

There is then a statute akin to Sec. 6212 Montana R. C. 1921, and reading:

> "The dissolution, for any cause whatever of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution."

The Montana Court quotes Section 6013 Revised Codes of 1921, and construes it in harmony with similar constructions by other state courts. These statutory provisions should have no faith nor credit in the eyes of the petitioner.

XIV.

WHILE THE IOWA COURT DID NOT EXERCISE THE AUTHORITY OF SEC. 8613, C 1 (R. 28), THERE IS AN IMPORTANT MATTER IN CONNECTION WITH THAT SECTION FOR THE CONSIDERATION OF THIS COURT.

That was a part of the acts of the Forty-third General Assembly of Iowa which was in session from January to April, 1929. If Federal Surety Company imported its general statutes to Montana at some time prior to 1925, at which time it was doing business in Montana, and furnished the bond which occasioned the liability (R. 56), IT DID NOT IMPORT THIS STATUTE.

XV.

PETITIONER DEMANDS THAT HIS JUDGMENT AND THE IOWA STATUTES SHOULD HAVE SUPREMACY OVER VALID MONTANA STATUTES. HE EVEN INSISTS THAT A STATUTE OF IOWA ENACTED LONG AFTER THE ENTRANCE OF FEDERAL SURETY COMPANY INTO MONTANA, SHOULD CONTROL STATUTES OF MONTANA.

Petitioner must take this position therefore, that having agreed to be bound by the Montana statutes, Federal Surety Company, although not having any limitations in its charter for the appointment of a liquidating officer such as he claims were afforded by later Iowa enactment and the application of the doctrine of Relfe vs. Rundle thereto, that he can bring in all later Iowa enactments to his aid. To permit him to do so would impair rights accrued to Montana creditors by virtue of a valid law of Montana.

It is elementary law that the general public policy of a state, when it violates no principle of constitutional law, is controlling.

In at least two other states besides Montana, viz: Kentucky and California, a constitutional provision similar to Article XV Sec. 11 of the Montana Constitution, is found. This Constitutional provision is found in Article XII Sec. 15 of the California Constitution.

See 7 Cal. Jur. 217, Sec. 701.

The Kentucky case of Castle v. Acrogen Coal Co., 145 Ky. 591; 140 S. W. 1034, also applies the Kentucky Constitution.

The Federal Court in Williams v. Gold Hill Min. Co., 96 Fed. 454, has held the California Constitution to declare the public policy of the state with regard to foreign corporations, and applied it in harmony with the California declaration on the subject.

We direct particularly to the attention of the Court, the case of Clark v. Supreme Council C. F. 146 Cal. 598; 80 Pac. 931, refusing to permit a foreign receiver such as Clark, to appoint an ancillary receiver in the state, and take away assets levied upon by local creditors in accordance with valid California laws.

See also Lackman v. Supreme Council, 142 Cal. 22; 75 Pac. 583; Borton v. Brines-Chase Co., 175 Pa. 209; 34 Atl. 597; 53 C. J. 406.

XVI.

THE IOWA VIEW OF THE EFFECT OF JUDGMENTS SUCH AS THE ONE AT BAR, IS IN HARMONY WITH THE CONTENTIONS OF RESPONDENTS.

In Schloss v. Met. Surety Co., 149 Ia. 382, 128 N. W 384,

is found a complete analysis of this very situation. The Iowa Court differentiates Relfe vs. Rundle. We commend the reading of this case with a view of ascertaining the public policy in Iowa, and the construction which Iowa places upon judgments of like character to the one sought to be enforced in this case. We consider the expressions of the Iowa Court in this case practically conclusive on facts so similar as to be almost identical. In other words, if the judgment at bar is to be given the force and effect that it would be given in Iowa, then what effect the Iowa Court declares it would give to a similar judgment coming to it from elsewhere, is conclusive.

The later act of the Forty-third General Assembly (which was in session from January to April, 1929), declaring, "The Commissioner of Insurance henceforth shall be the receiver and/or liquidating officer for an insurance company," etc., does not indicate any enlargement of his powers or suggestion of a trust. He was not selected as liquidating officer by the decree of September 25th.

The word "liquidating" from which the words "liquidation" or "liquidator" are derived, means, according to 37 C. J. 1263: "to adjust; to ascertain or reduce to precision in amount; to ascertain the balance due; to whom due, and to whom payable; to clear away, to lessen a debt; to clear from obscurity; to clear up; to determine by agreement the precise amount of indebtedness; to extinguish an indebtedness; to pay; to pay and settle; to reduce to precision in amount; to satisfy; to settle."

It will be seen that in no sense is there any implication of the passing of title. The words of nearest analogy to "liquidating officer," are "liquidating partner," 37 C. J. 1264. He is declared to be "the partner who, upon the dissolution or insolvency of the firm, is appointed to settle its accounts, collect

assets, adjust claims and pay debts."

Whatever may have been the legislative intent in the use of "receiver and/or liquidating officer," it is clear that it meant that the Court might appoint the Commissioner as receiver, and use its discretion with regard to whether or not he should be appointed as liquidating officer; whether that phrase has greater or less significance than that of receiver.

The entire decree will be searched in vain for the use of any other word or phrase in that connection, than "receiver."

The use of this phrase (and/or) in contracts seems to be entirely permissible, and is said to be equivalent to a direction that it be construed so as to best accord with the equity of the situation, using either conjunction, but such usage cannot apply to statutes, since the Legislature, in making its laws, must exercise its own law and leave nothing to the mere will and caprice of the courts.

State v. Dudley, 106 S. 364; 159 La. 872.

In any event if it were a matter of discretion in the court, the decree of September 25th indicates no exercise of the Court's discretion. It is very important that under the guise of instructions and without binding effect, Clark who was interested in the enlargement of the scope of the decree presented for signature, the ex parte order of December 21st.

XVII.

DEVOLUTION OF TITLE DISCUSSED IN FORMER BRIEF.

We have, in our original brief, discussed the question of devolution of title. We shall not again burden the Court with a re-citation of the authorities, nor with the discussion pertaining thereto as found in that brief.

We do not abandon our position or any position we have taken therein.

RESUME.

The Respondents respectfully submit this resume of their contentions.

1. There has been no attempt on the part of the Montana Court to refuse full faith and credit to the Iowa judgment and decree.

2. The judgment, the effect of which petitioner would like to dispel; is a valid, enforceable and unattacked judgment.

3. There was no attempt made by petitioner to appear in that independent case and assert a plea in abatement. Clark is indirectly attacking a judgment valid upon its face.

4. Respondents are asserting rights which grew up under a statute existing at the time Federal Surety Company entered the state, and to which Clark owes the duty of giving full faith and credit under the same constitutional provision that he invokes.

5. Petitioner seeks to ride down the Montana Constitution and statute by virtue of a statute enacted in 1929, years after the enactment of the Montana statute, and years after Federal Surety Company entered Montana, the accruing of respondents' cause of action, the initiation of their suit, and the vesting of their rights under the remedial provisions of the Montana statute.

6. The Iowa Judgment construed with the utmost liberality in conjunction with statutory justification, casts the rights of Clark into the category of cases determined in Booth vs. Clark, supra, and is clearly distinguishable from the cases asserting the doctrine of Relfe vs. Rundle, supra.

7. The Montana statute is a remedial statute and binding as to all matters of procedure upon those asserting judgments from sister states.

8. The judgment asserted by Clark as affording rights contended for, was asserted, not in an action instituted by him but in an action instituted by another, which action was of such character as to fail to give the Court in which the judgment was asserted, jurisdiction.

We respectfully submit that the judgment of the Montana Court should be affirmed.

Respectfully submitted.

LOUIS P. DONOVAN,

H. LEONARD DeKALB.

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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 449

E. W. CLARK, as Receiver,
Petitioner,

vs.

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Respondents.

BRIEF FOR GEORGE S. VAN SCHAICK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, SUBMITTED AS A FRIEND OF THE COURT.

LOUIS H. PINK,
of New York City,
Attorney for GEORGE S. VAN SCHAICK,
as Superintendent of Insurance of the State of New York.

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Statement.

The Superintendent of Insurance of the State of New York files a brief in this appeal as the issue is of vital importance in the administration of numerous inter-state insurance companies which the New York Department is liquidating. In addition to fourteen title and mortgage companies, among which are the largest and most important in the state, the Department has during the past three years taken over twenty-eight insurance companies with assets having a book value of upwards of $230,000,000. Among

these are the National Surety Company of New York, the largest surety company of its kind in the world, and the Globe and Rutgers Fire Insurance Company, the third largest fire company in the United States. Large inter state companies such as the Southern Surety Company of New York and the Lloyds Insurance Company of America, now in liquidation, did business in practically every state. The fact that upwards of 300,000 notices to creditors were mailed out in the Southern Surety Company proceeding and some 500,000 notices in that of Lloyds Insurance Company is some indication of the wide public interest. The efficient administration of such companies is dependent upon the cooperation of the courts and officials of practically all of the states.

The Importance of Uniform Law and Procedure in the Liquidation of Inter-State Insurers.

The liquidation of large insurers with reasonable promptness under uniform conditions and without preference to creditors, because they happen to live in one state rather than another, is of vital importance to the people of the entire country. It is hoped that the decision of the Supreme Court of the United States in this cause will set at rest many of the doubts, inequalities, and difficulties which now exist and will make for a just and uniform administration of large insurers wherever their domicile. It is for this reason that the Superintendent of Insurance of the State of New York, who bears the brunt of inter-state liquidation, takes the liberty of filing a brief and appearing in this cause as a friend of the Court. It is our intention to dwell upon the public policy of the controversy rather than the discussion of the reported cases so fully covered in the briefs of the parties to the litigation.

The situation is acute, not alone because of unwarranted preferences acquired by local creditors. Even though the ancillary liquidator ultimately prevails, he is forced into [illegible] and compromises which result in the diversion of

assets away from creditors. Liquidation expense out of all proportion to accepted standards is necessarily incurred.

The very fact that doubt exists as to the rights of the domiciliary liquidator causes loss and waste. That doubt is a temptation which causes creditors in foreign states to reach for advantages which are invariably costly to defeat. They are at home and in a friendly forum. The domiciliary receiver is in an unfriendly tribunal and has to go to the expense of hiring special counsel not familiar with the litigation.

If the administration of large inter state insurers which have become delinquent is to be carried out with some degree of efficiency, the primary receivers, particularly where title to the assets is vested in them through the laws of the state of the domicile, must assert generalship over the collection of monies due, the adjudication of the claims against insolvent companies, and the general administration of the assets and affairs throughout the entire country. Efficient and equitable administration is out of the question if liquidations are to be hindered and hampered at every turn and the liquidator is constantly forced to decide between expensive litigation and unfair preferences to local creditors.

A possible solution of this problem, which has become unusually burdensome in these years of the depression, may be federal legislation similar to the Bankruptcy Laws of the United States. In the absence of such legislation greater recognition of the power, authority, and control of the state of the domicile and efficient cooperation by local representatives and ancillary receivers in the various states is essential.

This case presents to the Court the opportunity to set at rest the chaos which now exists, not by establishing any new conception of the problem, but by applying principles already enunciated by this Court in *Relfe* v. *Rundle*, 103 U. S. 222, and *Converse* v. *Hamilton*, 224 U. S. 243.

There is a clear line of demarcation between those cases where the liquidator's rights are asserted under a corporate charter as contrasted with those in which such rights

are asserted under a law or decree apart from or outside of the corporate charter.

The New York Department constantly encounters resistance based on such cases as *Booth* v. *Clark*, 17 How. 322 and *Security Trust Co.* v. *Dodd*, 173 U. S. 624, where the domiciliary liquidator sought to act in a foreign state without the aid of a statutory charter provision. In those cases the domiciliary statutes dealt with were not corporate charter provisions.

While the ordinary statute or court decree has no extra-territorial effect except by comity, when the statute is part of the corporate charter, it has extra-territorial operation because it is a charter provision. When the decree of dissolution is provided for in the charter, it operates abroad not merely as a decree, but as a fundamental provision of the charter itself. The principles relating to statutes which are not also charter provisions are not applicable for the liquidation statute is as vital a part of the charter as though transcribed in full in the document itself.

Specific Examples of Unfair Local Preferences.

While the officials in many states are cooperative they cannot control the tactics of individual creditors. More often than otherwise the laws and court decisions are fair and just, not only to local creditors, but to all creditors; yet the exceptions to the rule are sufficiently numerous to materially slow down liquidation, to create favored classes of creditors, and to cause waste of assets. In New York as in Iowa the Superintendent of Insurance is the statutory receiver and is vested both by statutory charter provisions and by the court with title to the assets of the companies in liquidation. Yet some of the states pay no attention to the fundamental charter provisions:

> In Montana, despite the fact that the Southern Surety Company of New York was dissolved on March 22, 1932, and the assets both by statute and

by court order were vested in the statutory liquidator, a local general creditor thereafter secured a judgment against the Southern Surety Company of New York, although it no longer existed, and attached the property of the Liquidator which was deposited for the benefit of compensation claimants with the Treasurer of the Industrial Accident Board of the State of Montana. The Liquidator is now endeavoring to have the attachment removed.

In Michigan the Commissioner of Insurance of that state, at the request of the New York Liquidator, applied for the appointment of a receiver to take charge of the affairs of the Southern Surety Company of New York in that state. One of the Deputy Insurance Commissioners was appointed receiver, collected the local assets so far as he was able, and began the adjudication of the claims. The day prior to the appointment of the Deputy Commissioner as receiver, a local creditor of the Southern Surety Company applied in a different county and before another judge for the appointment of a receiver in a creditor's action. Such receiver was appointed but did not function. A proceeding was brought, however, to determine which receiver was properly in control and the court decided that as the creditor's action was begun first the receiver appointed in that action was the proper receiver and the appointment of the Deputy Commissioner of Insurance was invalid. While the laws of Michigan are not entirely clear, the Supreme Court of Michigan in deciding that the receiver appointed in the judgment creditor's action had precedence asserted: "When the receiver was appointed, a lien was created in favor of the judgment creditor on the debtor's property in this state. * * * From the moment of his appointment the property of the insolvent debtor in the State of Michigan was in-

custodia legis and the Court had the power to preserve it to satisfy the plaintiff's judgment."

In *McBride* vs. *Wayne Circuit Judge* the Supreme Court of Michigan in a similar proceeding said:

> "The purport of these rules is that a judgment creditor's suit is an individual proceeding to collect a specific debt, not a proceeding for the distribution of the debtor's property among his creditors generally."
>
> *McBride* v. *Wayne Circuit Judge*, 250 Mich. 1.

A substantial part of the property of the Lloyds Insurance Company of America, now being liquidated by the New York Superintendent, is in the State of Michigan. The Superintendent is endeavoring to have a contract entered into between the New York Liquidator and the Receiver in Michigan which will recognize the law of the domicile and provide for the transmittal of the assets to the Liquidator after the expenses of the local receiver, trust funds, and legitimate preferences have been paid. The contract has not been signed, although a similar contract has been signed in a previous liquidation proceeding. The court intimated in its discussion that "the question of law is whether this Court would have the authority to make any such order as is sought by the petition unless it is shown that it would be for the advantage of the creditors in Michigan."

Even in the State of Pennsylvania, which has generally pursued an enlightened policy in such matters, there are decisions to the effect that the local creditors of a foreign insurance company must be paid in full before any assets may be removed from the state. While this rule may not apply to a statutory liquidator the manner of dis-

tribution of such assets is not free from doubt. It is manifestly unfair that general creditors throughout the country receive only ten cents on the dollar while those who happen to reside in Pennsylvania get one hundred cents on the dollar if the insurer happens to have substantial property in that state.

In *Frowert* v. *Blank*, a case in which the receiver of the New York company was attempting to secure control of the funds in the State of Pennsylvania, the Supreme Court of Pennsylvania said:

> "When the funds of the insolvent corporation in Pennsylvania were placed in the hands of the ancillary receiver, they were subject to the claims of the creditors of the corporation in this state. The New York receiver had no lien upon them, and could not take possession without authority of the court, which, as has been seen, would not be granted as against the rights of domestic creditors. * * * The creditors here had but one course to pursue to enforce their claims against the money in the hands of the ancillary receiver, and that was to prove them before the auditor appointed to distribute the fund. * * * We think there was no error committed by the court below in awarding the funds in the hands of the ancillary receiver to the domestic creditors as against the claim of the foreign receiver."

In its opinion the court quotes with approval many cases holding that local creditors are entitled to have their claims satisfied in full before property may be taken out of the state by the primary receiver.

Frowert v. *Blank*, 205 Pa. 299, 54 Atl. 1000.

The New York Indemnity Company was dissolved and title to its assets was transferred to the Superintendent of Insurance February 16, 1933. This company had money on deposit in an

Ohio bank. On May 1, 1933, two months after the dissolution of the company, an action was started by local creditors against the dissolved company and funds in the bank were attached. The Liquidator is now intervening in an effort to prevent the distribution of the assets of the corporation in Ohio to local creditors under the attachment. Another local creditor since the dissolution of the company has begun an action against the dissolved company, although it no longer exists, to recover judgment and also for the attachment of its property in the State of Ohio. Similar actions begun after dissolution are now pending in other states against New York corporations in the hands of the Superintendent for liquidation.

These specific cases are mentioned only as typical of local attacks which are constantly being made upon the rights and assets of the New York insurers by local creditors in other states. While it would seem that the rule laid down by this Court in *Relfe* v. *Rundle*, 103 U. S. 222, and other similar cases cited in appellant's brief would set such litigation at rest, this decision has not been accepted as controlling in many of the states. The facts in the case now on appeal are perhaps more closely in point and present clear cut the issue as to whether the fundamental statutory provisions of the domicile must be recognized in other states as a matter both of comity and of right or whether they may be disregarded whenever it is to the selfish advantage of local claimants.

General Order No. 51 in Bankruptcy.

The same conditions that made necessary the enactment of a national bankruptcy law plead for uniform procedure in the inter-state liquidation of large insurers. This Court has always been jealous of the rights of creditors in the various states to share equally and without unfair prefer-

ence. The Court has also indicated by its recent adoption of General Order No. 51 in Bankruptcy that the appointment of unnecessary ancillary receivers in derogation of the control of the primary receiver will be frowned upon. The liquidator of a large insurance company, like a Receiver in Bankruptcy, must of necessity have general control of the assets and administration of the affairs of the company throughout the United States. General Order No. 51 protects the primary receiver from the appointment of hostile ancillary receivers at the behest of local creditors. Ancillaries in the various states may not be appointed unless the necessity is shown and the primary receiver consents. By this rule the Court has recognized the advisability of the centralization of a proceeding in the hands of the primary receiver. The reasons for preventing interference with the orderly administration of estates in bankruptcy apply equally to inter state insurers.

It is not urged that the rule in bankruptcy is controlling but only that it indicates the intention of this Court to protect primary receivers from molestation, unfair discrimination and annoyance in carrying out the administration of their trusts.

While we promised not to duplicate the discussion of the law which the parties to this litigation have covered in their briefs, we desire to say a word concerning the recent decision of this Court in *Oakes* v. *Lake*, decided November 6, 1933, which counsel for the parties herein have not mentioned. The opinion in that case emphasizes that the rights of the foreign receiver who has been vested with title will be protected in other states as a matter of constitutional right as well as of comity. As the Court says:—

> "(1) The general rule undoubtedly is that an ordinary chancery receiver, having no other authority than that arising from his appointment as such, cannot as of right maintain an action in a state other than that in which he was appointed. The decision in Booth *v.* Clark, 17 How. 322, 15 L. Ed. 164, to that effect has been uniformly followed

by this court. See, for example, Great Western Mining Co. *v.* Harris, 198 U. S. 561, 25 S. Ct. 770, 49 L. Ed. 1163; Sterrett *v.* Second National Bank, 248 U. S. 73, 39 S. Ct. 27, 63 L. Ed. 135. The very terms in which the rule is expressed, however, clearly recognize that where the receiver has 'other authority than that arising from his appointment as such,' he may under some circumstances maintain an action outside the state of his appointment. And so it definitely has been held.

(2) The foreign receiver may maintain such a suit, so far at least as the federal courts are concerned, where title to the property in question has been vested in him by conveyance, or statute. In Bernheimer *v.* Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, it was held that a receiver might sue in a foreign jurisdiction to collect upon the statutory liability of stockholders of a corporation, where the statute of the state conferred the right upon the receiver as quasi assignee. Following that decision, this court, in Converse *v.* Hamilton, 224 U. S. 243, 256 et seq., 32 S. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292, while reiterating the rule laid down in Booth *v.* Clark, supra, pointed out that the receiver suing in the Hamilton Case was not merely an ordinary chancery receiver, but much more; that under the laws of the state of his appointment he became a quasi assignee, vested with the rights of the creditors against the stockholders, and charged with the enforcement of those rights in the courts of the state and elsewhere; that his right to maintain an action in another state properly could not be denied as presenting a question only of comity unaffected by the full faith and credit clause of the Federal Constitution. The case involved the right of a receiver of an insolvent Minnesota corporation to maintain a suit in Wisconsin against two stockholders to enforce an asserted double liability imposed by the Minnesota statute. The Wisconsin court refused to entertain the suit, holding it to be a matter of comity; but this court, denying that view, reversed on the ground that thereby the laws of Minnesota and the judicial proceedings of that state had not been accorded the faith and credit to

which they were entitled under the Federal Constitution.

(3) In the case just dealt with, and in other cases where the receivership property has been assigned to the receiver by its owner, the suit is brought not strictly in his capacity as receiver, by virtue of his appointment in another state, but in his capacity as assignee. High, Receivers (4th Ed.) §244. His designation as receiver, etc., in the title of the cause may be regarded as descriptio personae merely.

* * * * * * * * *

In some of the cases cited the courts seem to have put their determination in favor of the receiver upon the ground of comity. With this view, however, we do not agree. It is a matter of right, as this court has said. Converse *v.* Hamilton, supra.

The true rule is stated in Robertson *v.* Staed, supra, by the Supreme Court of Missouri, where it was held that where the receiver has taken possession of property in pursuance of his appointment, a special property is thereby vested in him which enables him to maintain a suit for the recovery of the property in a foreign jurisdiction; and that the principle upon which that may be done is 'one of law and not of comity'."

Oakes v. *Lake*, 54 Sup. Ct. Rep. 13.

The "matter of right", referred to in *Oakes* v. *Lake*, has been disregarded because the state courts too often fail to accord to the statutory charter provision the attributes to which it is entitled.

Sometimes this is deliberate rather than inadvertent and springs from a desire to benefit the local creditor. The desire to benefit the local creditor at the expense of others, while understandable, should not be permitted to prevail against the rights and interest of the country as a whole, nor should selfish local considerations be permitted to prevent the application of the principles of equity and justice clearly enunciated and repeated by this Court.

In the interests of orderly liquidation, and the rights of all creditors wherever situate to share equally in the assets; to prevent interference with the control of those entrusted with the liquidation of large inter state corporations it is respectfully submitted that the decision of the Montana Supreme Court should be reversed.

LOUIS H. PINK,
Attorney for George S. Van Schaick, as Superintendent of Insurance of the State of New York.

SUPREME COURT OF THE UNITED STATES.

No. 449.—October Term, 1933.

E. W. Clark, As Receiver, Petitioner,
vs.
Harry O. Williard, W. W. Wheaton, and C. W. Hay, As Trustees of Gordon Campbell-Devin Syndicate, et al., Respondents.

On Writ of Certiorari to the Supreme Court of the State of Montana.

[April 2, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

The question is whether full faith and credit has been given by the courts of Montana to the statutes and judicial proceedings of the State of Iowa. United States Constitution, Art. IV, § 1.

The petitioner, the official liquidator of an Iowa insurance company, declares himself the universal successor of the corporation (*Keatley* v. *Furey*, 226 U. S. 399, 403, 404), the representative of its personality and powers after its life has been extinguished. *Relfe* v. *Rundle*, 103 U. S. 222; *Martyng* v. *American Union Fire Insurance Co.*, 216 N. Y. 183; *Deschenes* v. *Tallman*, 248 N. Y. 33, 37. The Supreme Court of Montana has held that his title to the assets, if he has any, is derived, not from any statute, but from an involuntary assignment under a judgment of a foreign court. A title traced to such a source is subject in Montana to attachment and execution at the suit of local creditors. The question has been left unanswered whether attachments and executions are enforcible to the same extent in derogation of the title of a statutory successor.

Federal Surety Company was organized as an insurance corporation under the laws of Iowa, and thereafter received authority to do business in Montana. In September, 1931, the State of Iowa sued it, alleging its insolvency and praying for a decree of dissolution and the distribution of the assets. A statute of Iowa provides that "the commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company,

association or insurance carrier, and shall serve without comp
sation other than his stated compensation as commissioner of
surance, but he shall be allowed clerical and other expenses ne
sary for the conduct of such receivership." Code of Iowa, 1
§ 8613-e-1. See also Code of Iowa, 1931, §§ 8402, 8964. On S
tember 29, 1932, a decree in favor of the state was entered by
fault, and an amended decree on December 27 of the same y
By these decrees the corporation was adjudged to have been
solved on September 25, 1931; the Commissioner of Insurance
W. Clark, was adjudged to be "the successor to said corporatio
and as such to hold "title to all property owned by Federal Su
Company at the time it so ceased to exist;" and liquidation
decreed in accordance with the statute.

We have said that the corporation had authority to do busi
in Montana. The grant was subject to conditions. A statut
Montana provides that the dissolution of a corporation does
"take away or impair any remedy given against any such
poration, its stockholders or officers, for any liability which
been previously incurred." See 6013, Montana Revised C
of 1921. The preservation of existing remedies is not confine
domestic corporations. It applies to foreign corporations
This results, in the view of the Montana court, from a provisio
the state constitution as well as from a supplementary statute.
Article XV, § 11, of the Montana constitution, "no company
corporation formed under the laws of any other country, stat
territory, shall have, or be allowed to exercise or enjoy wi
this state any greater rights or privileges than those possessed
enjoyed by corporations of the same or similar character cre
under the law of the state." And by a supplementary sta
§ 6059, Revised Codes, 1921: "All foreign corporations licen
to do business in the state of Montana shall be subject to all
liabilities, restrictions, and duties which are or may be impo
upon corporations of like character organized under the laws
this state, and shall have no other or greater powers." Cons
ing that statute, the Supreme Court of Montana has written
the case now under review: "Suits against domestic corporat
do not abate upon the entry of a decree of dissolution, and
same rule by virtue of this statutory provision, must apply
foreign corporation."

Long before the dissolution of the Federal Surety Company, the respondents Williard and Wheaton, as trustees of a syndicate, brought suit in a Montana court to recover from the surety company the damages due upon a bond. The first trial resulted in a nonsuit, which was reversed upon appeal. 91 Mont. 465. After the decree of dissolution the case came on for a second trial, and on May 10, 1932, judgment in favor of the plaintiffs was entered by default. The Supreme Court of Montana has held that the dissolution of the surety company did not abate the suit. There was thus a final judgment, valid under the Montana practice and effective according to that practice to liquidate the claim.

To say that there was such a judgment is not to dispose of the whole case. A judgment existing, the remedies available to enforce it are still to be determined. Before the respondents were in a position to issue execution, the situation had been complicated by a suit for the appointment of a receiver begun in a Montana District Court. On March 25, 1932, Meyer, a simple contract creditor, brought suit against the surety company and Clark, the foreign liquidator, praying an ancillary receivership to preserve the local assets. A temporary receiver (Crichton) was appointed the same day. While that suit was pending, the respondents filed a petition on May 21, 1932, for leave to issue an execution against securities and moneys which had been discovered in Montana, the levy to have the same effect as if no receiver had been appointed. An order to that effect was granted, subject, however, to a later motion to vacate it. Within due time thereafter, Clark, filed a cross petition and an answer, asserting his title as successor to the dissolved corporation, opposing the demands of the judgment creditors, and setting up his rights and privileges under Art. IV, § 1, of the federal constitution. On August 25, 1932, the District Court of Montana entered a final decree adjudging that Clark was the successor to the personality and title of the Iowa corporation, that the assets should be liquidated and ratably distributed subject only to the liens existing at the date of dissolution, that Crichton should be continued as an ancillary receiver to assist the foreign liquidator, that the assets in Montana should be retained in that state until local creditors had received their ratable proportion of assets there and elsewhere, and that the execution upon the respondents' judgment and any preference thereby created, as well

as the earlier order sanctioning the levy, should be set aside and cancelled.

From that decree, and from an order denying a motion to vacate or modify it, the judgment creditors, who are the respondents in this court, appealed to the Supreme Court of Montana. After argument and reargument, the decree and order were there reversed, two members of the court dissenting. *Mieyr* v. *Federal Surety Company*, 23 Pac. (2d) 959. The court held that the respondents' judgment had been lawfully recovered though the defendant was dissolved; that the ancillary receivership was void for the reason that a simple contract creditor (Mieyr) was without standing to maintain the suit; that Clark, the foreign liquidator, was not the successor to the corporate personality with a title derived from the statutes of the domicile, but was a chancery receiver with a title (if any) created by the Iowa decree; that as against such a receiver creditors in Montana were at liberty to levy attachments and executions, irrespective of their right to enforce such a levy against a statutory successor; and hence that the respondents' execution should be reinstated, and the cause remanded for further proceedings in accord with the opinion. A writ of certiorari brings the case here.

Our jurisdiction to issue the writ is challenged on the ground that the decree to be reviewed is without the requisite finality. Judicial Code, §237; 28 U. S. C., § 344. The challenge should not prevail. The decree of the Montana court is final to the extent that it confirms the respondents' execution and permits a levy that will override the liquidator's title. A final order results where a court denies a petition by an intervening creditor to establish a prior lien (*Gumbel* v. *Pitkin*, 113 U. S. 545, 548), or a petition by a municipal corporation intervening in a foreclosure suit to enforce a lien for taxes superior to the mortgage (*Savannah* v. *Jesup*, 100 U. S. 563, 564, 565), or one by a chancery receiver appointed by a state court for the delivery of property in the possession of another court. *Ex parte Tiffany*, 252 U. S. 32, 36. Cf. *Hovey* v. *McDonald*, 109 U. S. 150, 155; *Williams* v. *Morgan*, 111 U. S. 684, 689; *United States* v. *River Rouge Co.*, 269 U. S. 411, 414; *Dexter Horton National Bank of Seattle* v. *Hawkins*, 190 Fed. 924, 927. The doctrine of those cases is applicable here. Further judicial proceedings may be necessary between the liquidator and others not

before us. As between the liquidator and the respondents claiming as judgment creditors the suit is at an end. They came into court *pro interesse suo* with a petition to establish the priority of their judgment. The petition has been granted and priority decreed. Not only that, but an order vacating the execution has been reversed, and the levy reinstated. So far as these respondents are concerned, there is nothing more to be decided. "The property of the Federal Surety Company within the state of Montana at the time of the levy of the execution by Williard et al., not being in possession of the Iowa receiver, was subject to levy, and the levy made under the execution in May, 1932, is good and valid." By that opinion, which by reference was incorporated in the judgment (*Metropolitan Water Co.* v. *Kaw Valley District*, 223 U. S. 519, 523; *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135), nothing was left to the discretion of the trial court in respect of the priority of the execution or of the respondents' rights thereunder. The intervening petition has been finally disposed of, and no longer is a pending proceeding, whatever may be said of the suit in which the claimants intervened. Cf. *Forgay* v. *Conrad*, 6 How. 201, 202, 203; *United States* v. *River Rouge Co., supra.*

Jurisdiction being here, the case will be considered on the merits.

We assume in accordance with the decision of the Montana court that the respondents' action against the surety company did not abate on dissolution, but was lawfully pursued to judgment. *McGown* v. *Scales*, 9 Wall. 23; cf. *Sinnott* v. *Hanan*, 214 N. Y. 454, 458, 459; *Marstaller* v. *Mills*, 143 N. Y. 398, 400. Cases such as *Remington & Sons* v. *Samana Bay Co.*, 140 Mass. 494, and others cited in the margin[1] are not at war with this conclusion. They express the rule to be applied when there is no statute or public policy to the contrary in the state where the foreign corporation has been licensed to do business. They do not delimit the capacity of a state, when granting such a license, to subject it to conditions. Complications might exist if there had been no one within the state upon whom process could be served. Here the action was begun, and the company had appeared and answered, before the date of dissolution. Moreover, a power of attorney was on file, pursuant

[1]National Surety Co. *v.* Cobb, 66 F. (2d) 323; Marion Phosphate Co. *v.* Perry, 74 Fed. 425; Fitts *v.* National Life Association of Hartford, 130 Ala. 413, Riddell *v.* Rochester German Insurance Co., 35 R. I. 45; Morgan *v.* New York National Building & Loan Association, 73 Conn. 151.

to the Montana law (Revised Codes, 1921, sec. 6212), whereby process might be served on the Insurance Commissioner of the state, the power to remain in force so long as any policy or liability of the company was outstanding in Montana. Cf. *American Railway Express Co.* v. *Kentucky*, 273 U. S. 269, 274; *Washington* v. *Superior Court*, 289 U. S. 361, 364, 365. Complications also might exist if there were no one in being with authority to continue the defense. Here there had been the designation of a liquidator who was competent to represent the corporation if he had chosen to intervene. Cf. *Oklahoma Natural Gas Co.* v. *Oklahoma*, 273 U. S. 257. We are not to be understood as intimating that such complications would be fatal if they existed, but merely to exclude them. In such circumstances the judgment is at least effectual to liquidate the claim as a charge upon the local assets. But this, as we have seen, is only a partial statement of the problem. To ascertain the procedure by which the charge is to be enforced, whether by the levy of execution or by a ratable division, other considerations must be weighed. In particular it must be known whether superior interests or titles have developed between the summons and the judgment, and whether the quality or operation of those interests affects the method of distribution. Something did intervene here, the appointment of a liquidator under the statutes of the domicile. That much is undisputed. Did the Supreme Court of Montana misjudge the quality and operation of this intervening interest, and in so doing did it deny to the statutes and decrees of Iowa the faith and credit owing to them under the Constitution of the United States?

In our judgment the statutes of Iowa have made the official liquidator the successor to the corporation, and not a mere receiver. *State ex rel. Attorney-General* v. *Fidelity Loan & Trust Co.*, 113 Iowa 439. His title is not the consequence of a decree of a court whereby a corporation still in being has made a compulsory assignment of its assets with a view to liquidation.[2] *Sterrett* v. *Second National Bank of Cincinnati*, 248 U. S. 73; *Lion Bonding Company* v. *Karatz*, 262 U. S. 77, 88; *Great Western Mining Co.* v. *Harris*, 198 U. S. 561, 575; *Booth* v. *Clark*, 17 How. 322. His

[2] The insolvent corporation in Sterrett *v.* Second National Bank of Cincinnati, *supra*, was not to be dissolved until there had been a final settlement of the business. pp. 74, 75.

title is the consequence of a succession established for the corporation by the law of its creation. *Relfe* v. *Rundle, supra; Keatley* v. *Furey, supra; Sterrett* v. *Second National Bank of Cincinnati, supra*, p. 77; cf. *Bockover* v. *Life Ass'n of America*, 77 Va. 85; *Converse* v. *Hamilton*, 224 U. S. 243, 257; *Bernheimer* v. *Converse*, 206 U. S. 516, 534. So the lawmakers have plainly said. So the Iowa court adjudged in decreeing dissolution.

We think the Supreme Court of Montana denied full faith and credit to the statutes and judicial proceedings of Iowa in holding, as it did, that the petitioner was a receiver deriving title through a judicial proceeding, and not through the charter of its being and the succession there prescribed. "When the transfer of a debtor's property," said the court, "is the result of a judicial proceeding there is no provision of the constitution which requires the courts of another state to carry it into effect and as a general rule no state court will do this to the prejudice of the citizens of its own state," citing *Reynolds* v. *Adden*, 136 U. S. 348, a case of insolvency proceedings *in invitum* against a natural person, and *Zacher* v. *Fidelity Trust Co.*, 106 Fed. 593, an enforced assignment to the receiver of a corporation which retained its corporate life. Bankruptcy or insolvency proceedings, whether the debtor is a natural or a juristic person, confer upon the receiver or assignee a title which, generally speaking, is without recognition outside of the state of his appointment except in subordination to the claims of local creditors. *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S. 624; *Cole* v. *Cunningham*, 133 U. S. 107; *Oakey* v. *Bennett*, 11 How. 33, 44; *Barth* v. *Backus*, 140 N. Y. 230; *Ward* v. *Connecticut Pipe Mfg. Co.*, 71 Conn. 345; *Gilbert* v. *Hewetson*, 79 Minn. 326. Upon the strength of these and like decisions the Montana court has refused recognition to a receiver or liquidator who in truth is a statutory successor. Whether it would have favored that conclusion if it had correctly interpreted his standing, its opinion does not tell us. The case should go back to the end that the priority of the execution may be determined with understanding of the title displaced and overridden.

In thus holding we do not say that there is an invariable rule by which the title of a statutory liquidator must prevail over executions and attachments outside of the state of his appointment. The subject is involved in confusion, with decisions *pro* and *con*.

There are cases which lay down the rule that the title of such a liquidator will have recognition and enforcement everywhere without affirming or denying the possibility of exceptions. *Kinsler* v. *Casualty Company of America*, 103 Neb. 382; *U. S. Truck Co.* v. *Pennsylvania Surety Co.*, 259 Mich. 422; *Bockover* v. *Life Association of America*, *supra*; *Parsons* v. *Charter Oak Life Insurance Co.*, 31 Fed. 305; *Fry* v. *Charter Oak Life Insurance Co.* 31 Fed. 197; cf. *Taylor* v. *Life Association of America*, 13 Fed. 493; *Smith* v. *Taggart*, 87 Fed. 94; *Southern Building & Loan Association* v. *Miller*, 118 Fed. 369. Other cases add a *dictum* (*Martyne* v. *American Union Fire Insurance Co.*, *supra*) that the state in which the title is assailed may declare a contrary policy by statute or decision. Cf. *Disconto Gesellschaft* v. *Umbreit*, 208 U. S. 570, 579, 580. Still others take the view that the claims of local creditors are entitled to precedence. *Schloss* v. *Surety Co.*, 149 Ia. 382; *Lackmann* v. *Supreme Council*, 142 Cal. 22. The position of a claimant who has the standing of a statutory successor is more closely analogous to that of a trustee under a voluntary general assignment for the benefit of creditors (*Ockerman* v. *Cross*, 54 N. Y. 29; *Warner* v. *Jaffray*, 96 N. Y. 248, 255; *Hervey Co.* v. *R. I. Locomotive Works*, 93 U. S. 664) than to one deriving title under a decree in insolvency proceedings (*Security Trust Co.* v. *Dodd, Mead & Co.*, *supra*, p. 628), yet it is stronger than either in that for many purposes the corporation under which he claims has passed out of existence.

Whether there is in Montana a local policy, expressed in statute or decision, whereby judgments and attachments have a preference over the title of a charter liquidator is a question as to which the Supreme Court of that state will speak with ultimate authority. It has not spoken yet. The tendency in most of the states is to give priority to the title unless a contrary policy is expressed with reasonable clarity. *Martyne* v. *American Union Fire Insurance Co.*, *supra*; *Kinsler* v. *Casualty Co.*, *supra*; *Bockover* v. *Life Association of America*, *supra*; cf. *Cogliano* v. *Ferguson*, 245 Mass. 364. No statute or decision brought to our notice from Montana removes the question from the field of doubt. True there are the statutes heretofore referred to whereby suit may be maintained against foreign corporations after dissolution on the same basis as against domestic ones. Nothing in those provisions declares the

existence of a policy to allow the assets of an insolvent corporation to be torn to pieces at the suit of rival creditors when they could be distributed equally and without sacrifice at the hands of a receiver. At all events the policy, if it exists, is indicated too obscurely to permit us to accept it until so instructed by the Montana court. The drastic consequences of acceptance attest the need of caution. Partnerships and individuals, if hard pressed, may resort to a court of bankruptcy and thus conserve their assets. Business corporations may have their assets equally distributed through involuntary proceedings. But insurance corporations, like banks, are excluded from bankruptcy altogether (11 U. S. C. sec. 22 b), and must submit to dismemberment, however great the waste or inequality, unless receivers are appointed. The respondents would have us say that submission to such consequences is exacted by an unbending rule of law.

We have no thought to impose our reading of the local statutes and decisions upon the courts of the locality. What we are about to say as to their meaning does no more than explain the grounds for our understanding that the courts of Montana have left the question open. If the law were clear beyond debate, as counsel for the respondents has contended that it is, our duty might be to dispose of the entire controversy now instead of remanding it to the state court for further action there. We are mindful of the practice whereby domestic corporations dissolved by the Montana law may be wound up by the directors as trustees in dissolution. Revised Codes, sec. 6011; formerly Civil Code, sec. 561. We understand also that while the assets are so held, claims may be reduced to judgment, and attachments and executions levied. This is doubtless the prevailing practice when the corporation is solvent, or when insolvency is not so gross as to lead to sacrifice or hardship. Inability to discharge liabilities as they mature, or even impairment of the capital prescribed by the articles of association, may not mean that the assets will be insufficient when put up at public sale. But administration by the directors, subject to attachment and execution, is not the only form of distribution that is known to the local law. In appropriate cases a dissolved corporation may be wound up by a receiver as an officer of the court. By § 9303 of the Revised Codes of 1921, a creditor of a dissolved corporation (presumably a judgment creditor) may apply for a receiver to

liquidate the assets,[3] and after such appointment executions are forbidden. *Gardner* v. *Caldwell*, 16 Mont. 221; cf. *Barker* v. *Edwards*, 259 Fed. 484, 488; *Rohr* v. *Stanton Trust & Savings Bank*, 76 Mont. 248, 251, 253; *Berryman* v. *Billings Mutual Heating Co.*, 44 Mont. 517, 521. The decisions are obscure as to the circumstances in which that statute will be applied. The vast majority of the Montana cases on the subject of receivers are grounded on another section (9301), under which the tests are very different. There is hardly a word in any of them as to the meaning of § 9303 and the remedy thereunder. Thus, in *Forsell* v. *Pittsburgh & Montana Copper Co.*, 42 Mont. 412, a creditor obtained a judgment against a foreign corporation, not dissolved, and execution was issued and returned unsatisfied. The creditor then applied for a receiver, but without alleging that there was any property within the state. The court held that no case was made out by

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[3] § 9303. "Upon the dissolution of any corporation the district court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members."

Another section dealing with the appointment of receivers is 9301, subd. 5. "A receiver may be appointed by the court in which an action is pending, or by the judge thereof: . . .

"In cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights."

By construction, that section has been limited to receivers appointed *pendente lite*.

"It is a well settled rule of law that there cannot be such a thing as an action brought distinctively and solely for the appointment of a receiver." State v. District Court, 50 Mont. 259, 263. A receivership is a provisional remedy. "An action must be pending before a receiver can be appointed." State v. District Court, *supra*.

All this according to our understanding has no relation to an application under § 9303, where the appointment of a receiver is the end and aim of the proceeding.

Compare the decisions in California under statutes identical in form: Henderson v. Palmer Union Oil Co., 29 Cal. App. 451; French Bank Case, 53 Cal. 495, 553; Havemeyer v. Superior Court, 84 Cal. 327, 365; State I & I Co. v. San Francisco, 101 Cal. 135, 147, 148; Elliott v. Superior Court, 168 Cal. 727.

the allegations of the bill. In *Berryman* v. *Billings Heating Co.*, 44 Mont. 517, 525, a temporary receiver was appointed in an action against a domestic corporation not dissolved. In aid of this appointment the plaintiff, a simple contract creditor, alleged that the defendant was insolvent. On appeal the court held that this without more did not make the appointment necessary, and vacated the receivership. In *Prudential Securities Co.* v. *Three Forks, etc., R. Co.*, 49 Mont. 567, 572, and again in *Scholefield* v. *Merrill Mortuaries, Inc.*, 93 Mont. 192, the situation was the same as in the suit by *Berryman, supra*, the applicants for the receiver being simple contract creditors suing to collect a debt. What was said as to the trust fund doctrine when invoked by a creditor so situated (49 Mont. at p. 572) is in full accord with the doctrine prevailing in this court. *Hollins* v. *Brierfield Coal and Iron Co.*, 150 U. S. 371. The case at hand is barely grazed by *Ferrell* v. *Evans*, 25 Mont. 444, 454. There the suit was for the appointment of a receiver to wind up a building and loan company whose charter had expired. The court held that there was no need of superseding the directors who were statutory trustees under § 6011 of the Revised Codes. The opinion states: "No exception is made in case of insolvency," but this is supplemented by the statement that in fact "the association was not insolvent." The *dictum* quoted does not amount to a decision that a receiver will never be appointed under § 9303 in a case where a corporation has been dissolved and multiplying executions threaten a dispersion of the assets. No such question was involved. The situation was much the same in *Merges* v. *Altenbrand*, 45 Mont. 355. The charter of a solvent corporation had expired, and there was no sufficient ground for superseding the directors through the appointment of receivers.[4]

[4]Gilna *v.* Barker, 78 Mont. 357, it would seem, is even farther from the case at hand. A creditor brought suit against a domestic corporation for the liquidation of a debt. The trial court dismissed the complaint on the ground that suit was unnecessary after the corporation had been dissolved. That judgment was reversed. The court did not hold that there would be no occasion for a receivership thereafter. It left that question open. "Counsel for defendants argue that plaintiff should have intervened in the case in which the court decreed a sale of the property of the defunct corporation and should have asked for a receiver. He may have been entitled to that privilege but, if so, it did not deprive him of the right to institute the instant case, reduce his claim to judgment and take the chance of realizing on it." p. 367.

We do not read these decisions as holding in any clear or final way that the directors of a dissolved corporation will never be required to give place to a receiver, no matter how great the danger of inequality or waste. Indeed, it is uncertain whether such a holding would be possible without denying any function to § 9303 of the Montana Code. Inequality and waste are to be avoided in special ne[illegible] when banks or insurance companies, unable, as we have seen, to have the protection of courts of bankruptcy, are in course of liquidation. The Supreme Court of Montana has been mindful of this need, at all events in respect of banks, and has stated it with force and clarity. Thus, in *Rohr* v. *Stanton Trust & Savings Bank*, *supra*, a creditor brought suit in the hope of gaining a preference for his deposit out of the assets of a bank in the hands of a receiver. The court said (p. 251), "the general principle of equity that the assets of an insolvent are to be distributed ratably among general creditors applies with full force to the distribution of the assets of a bank," and again (p. 253), "The available assets", are to be "so conserved that each depositor or other creditor shall receive payment or dividend according to the amount of his debt, and that none of equal class shall receive any advantage or preference over another." Cf. *Aetna Accident & Liability Co.* v. *Miller*, 54 Mont. 377, 389. It would seem that conservation of assets and equality of distribution are goods no less important in the winding up of insurance companies and of other moneyed corporations than in the winding up of banks.

From this survey of the decisions in Montana there results this truth, if nothing more, that there has been no definitive pronouncement as to the circumstances justifying a receivership for an insolvent corporation, and that the question is left open whether receivers of such a corporation will be appointed after dissolution to prevent waste or inequality. If that is so, it results also that the question is still open whether executions may be subordinated to the title of a foreign liquidator without a forbidden discrimination between corporations organized in Montana and those from other states. A statute preserving remedies after a decree of dissolution does not mean that for every purpose a corporation, though dissolved, is still a juristic person, or that equity is indifferent as to the mode of marshalling the assets. All that it means is that suits shall not abate, but may be prosecuted to judgment as if the cor-

poration were in being. What will be done afterwards in the enforcement of a judgment will vary with the circumstances. When a charter liquidator whose standing is recognized in Montana, is decreed to have an interest superior to the lien of later executions, as if his position were that of a receiver appointed by the local courts, there is no resulting inequality between foreign and domestic corporations, no favoring of the one class in hostility to the other. So, at least, the Montana court may not unreasonably decide. By hypothesis the domestic corporation after dissolution may be placed, upon a proper showing, in the hands of a receiver, and its assets ratably distributed. The foreign corporation, represented by a foreign liquidator, may be subjected to the same restraints. If supplementary directions are thought to be appropriate to the end that local assets may be kept within Montana till local creditors are paid their share of all the assets everywhere, there is power in a court of equity to assure the requisite equality. *Sands* v. *E. S. Greeley Co.*, 88 Fed. 130; *Receivers Middlesex Banking Co.* v. *Realty Investment Co.*, 104 Conn. 206; *Buswell* v. *Supreme Sitting of Order of Iron Hall*, 161 Mass. 224; *Fawcett* v. *Supreme Sitting of Order of Iron Hall*, 64 Conn. 170; *People* v. *Granite State Provident Association*, 161 N. Y. 492.

To resume: The Supreme Court of Montana will determine whether there is any local policy whereby an insolvent foreign corporation in the hands of a liquidator with title must submit to the sacrifice of its assets or to their unequal distribution by writs of execution.

If such a policy exists and the foreign liquidator is thus displaced, other questions may remain as to the power of the state which there is no occasion to consider in advance of the event.

The decree should be vacated in so far as it adjudges the validity and priority of the respondents' execution (cf. *Dorchy* v. *Kansas*, 264 U. S. 286, 291; *Missouri* v. *Public Service Commission*, 273 U. S. 126, 131), and the cause remanded to the Supreme Court of Montana for further proceedings not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 449. October Term, 1933.

E. W. Clark, As Receiver, Petitioner,
vs.
Harry O. Williard, W. W. Wheaton, and C. W. Hay, as Trustees of Gordon Campbell Kevin Syndicate, et al.

On Writ of Certiorari to the Supreme Court of the State of Montana.

[April 2, 1934.]

Separate opinion by Mr. Justice McReynolds:

This cause has been much obscured by verbiage. The practical problems incident to administering the affairs of insolvent insurance companies are often complex; but the issues presently presented for determination are narrow and ought to cabin our discussion.

In 1931 an Iowa court, proceeding under local statutes, adjudged that the corporate existence of the Federal Surety Company organized in that State had terminated; that E. W. Clark, receiver and liquidating officer, is its successor and holds title to all corporate property for the purposes of liquidation, etc.

January 31, 1928, the Surety Company being then authorized to transact business in Montana, respondents here Williard, Wheaton and Hay duly asked for judgment against it in the District Court of Fergus County. May 20, 1932, judgment went in their favor. Clark, the Iowa receiver, did not enter his appearance in the cause, made no effort to prevent the judgment. Execution issued and was levied, May —, 1932, upon property of the Company found in Montana.

In March, 1932, one John Mieyr brought suit against the Federal Surety Company in the District Court, Cascade County, Montana. He alleged indebtedness to himself upon an unliquidated claim, also indebtedness to other citizens of Montana for considerable sums, and that the company had much property within the State. He described the Iowa court proceedings wherein the Corporation was declared dissolved and Clark designated as

Receiver and averred that Clark was then attempting to obtain possession of the Company's property within Montana with intent to remove it. He asked for judgment for the amount of his claim; and that a local receiver be appointed to take possession of the company's assets in Montana and hold them subject to further order, &c. Thereupon, the court appointed D. A. Crichton receiver of the Montana assets, with powers as prayed; he duly qualified. Clark appeared specially and asked that Crichton's appointment be annulled because the court lacked jurisdiction. This motion was denied May 24th. On the same day Williard, Wheaton and Hay appearing by petition asked and received approval of their action in procuring levy of the Fergus County execution upon the corporation's property.

July 25, 1932, Receiver Crichton moved to annul the order of May 24, 1932, which approved the levy of the Fergus County execution.

August 3, 1932, Clark appeared and answered Meyer's complaint. He set out proceedings in the Iowa court and his designation as receiver; he asked an order confirming his title to the Company's assets, also for confirmation of Crichton's appointment as ancillary receiver.

August 25th the court authorized an order reciting that the corporate existence of the Surety Company was terminated by the Iowa proceedings and that title to all of its property passed to Clark as receiver. This order also confirmed the appointment of Crichton as receiver of Montana assets; directed all creditors in that state to file their claims, and that corporate assets should be delivered to him. And further that the order of May 24th permitting the Fergus County execution be set aside.

August 31, 1932, Williard, Wheaton and Hay asked the Cascade County District Court to vacate the order of August 25th upon the ground that the facts disclosed were not sufficient to justify appointment of the receiver; also because the court acted without jurisdiction. In the alternative, they asked that the order be so modified as to release all property seized under any Montana execution or attachment. This motion was denied the same day.

On September 18, 1932, Williard, Wheaton and Hay appealed from the judgment and order of August 25th confirming Crichton's

appointment as receiver, &c. and revoking the May 24th order which granted permission for levy of the Fergus County execution. Also, from the order of August 31st which denied their motion to vacate the one entered August 25th. The issues were thus limited. The opinion of the Supreme Court came down April 1, 1933. It said—

"The appeal presents the question whether appellants have the right to be paid the amount of their claim from the Montana property before any part of such property is transmitted to the Iowa receiver for administration through the Iowa receivership, when, as shown, their claim has been reduced to judgment and execution levied after the proceedings in the Iowa court designed to accomplish the dissolution of the corporation. Solution of the problem presented makes it necessary to determine the effect of the proceedings in the Iowa court upon the corporate life of the surety company."

Upon review of the Montana statutes, the Court declared that the suit against the Surety Company in Fergus County did not abate upon entry of the Iowa decree and that the judgment of May 20th therein was valid. It then came to consider whether levy under the Fergus County execution was good and said this "depends upon the effect of the order appointing Crichton receiver." It ultimately and definitely declared: "The petition of Mieyr for the appointment of a receiver was insufficient, in that he, being a general creditor, had no right to the appointment of a receiver and had an adequate remedy by which he could be fully protected, namely, the issuance and levy of a writ of attachment. The property of the Federal Surety Company within the state of Montana at the time of the levy of the execution by Williard, et al., not being in possession of the Iowa receiver, was subject to levy, and the levy made under the execution in May, 1932, is good and valid. The judgment and orders appealed from are reversed and the cause remanded for further proceedings in the district court in accordance with the views herein expressed."

The opinion definitely approved the claim of the appellants that the District Court of Cascade County was acting without authority and beyond its jurisdiction.

Upon the sole petition of Clark, Receiver, a writ of certiorari issued from this Court. We have no jurisdiction unless the judg-

ment of the State court was final; and only federal questions are open for our consideration.

The formal judgment of the Supreme Court directed—"For reasons stated in the opinion the judgment and orders appealed from are reversed and the cause remanded for further proceedings in accordance with the views expressed in the opinion." Upon its face this is not final within the meaning of the statute governing our jurisdiction. And "in matters of this kind we may not disregard the face of the record and treat the judgment as something other than it appears to be. So to do probably would lead to much confusion and uncertainty." *Hartford Acc. Co.* v. *Bunn*, 285 U. S. 169, 178. *McComb, Executor*, v. *Commissioners*, 91 U. S. 1; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4; *Haseltine* v. *Central Bank*, 183 U. S. 130; *Schlosser* v. *Hemphill*, 198 U. S. 173, 175; *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 268; *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U. S. 99, 101; *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437; *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135, 136.

Bostwick v. *Brinkerhoff*. "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. . . . If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently it has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error."

Haseltine v. *Central Bank of Springfield*. "We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. . . . While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be

done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the Supreme Court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher* [114 U. S. 127] 'they might have sued out a writ of error at once.'"

Schlosser v. *Hemphill*—an action in equity to quiet title. "By its judgment the Supreme Court of Iowa reversed the decree of the trial court and remanded the cause 'for further proceedings in harmony with the opinion of the court.' We have heretofore held that a judgment couched in such terms is not final in such a sense as to sustain a writ of error from this court. . . . . Doubtless the conclusions arrived at by the state Supreme Court, and expressed in its opinion, furnish the grounds on which the court below must proceed, when the case goes to a decree there, if no change in pleadings or proof takes place, but we cannot say what action might nevertheless be taken, and as no decree was entered in the Supreme Court, and no specific instruction was given to the court below, we think the writ of error cannot be maintained. Assuming, without deciding, that a Federal question was so raised as otherwise to have justified the exercise of our jurisdiction, we can but repeat what we said in *Haseltine's* case: 'The plaintiffs in the case under consideration could have secured an immediate review by this court, if the court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher*, they might have sued out a writ of error at once.'"

Louisiana Navigation Company v. *Oyster Commission*. Writ of error to Louisiana Supreme Court dismissed, judgment not final. "The contention, however, is that the judgment below is final for the purpose of review by this court, because when the opinion of the Supreme Court of Louisiana is carefully weighed it will be found that that court practically finally disposed ad-

versely to the title of the plaintiff of the substantial part of the lands involved in the suit and hence that the court in remanding the cause for further proceedings did so only as to other lands. But conceding this to be true, it does not justify the claim based on it. In the first place it is settled that this court may not be called upon to review by piecemeal the action of a state court which otherwise would be within its jurisdiction, and in the second place the rule established by the authorities to which we have referred is that on the question of finality the form of the judgment is controlling, and hence that this court cannot for the purpose of determining whether its reviewing power exists be called upon to disregard the form of the judgment in order to ascertain whether a judgment which is in form not final might by applying the state law be treated as final in character. Indeed it has been pointed out that the confusion and contradiction which inevitably arose from resorting to the state law for the purpose of converting a judgment not on its fact final into one final in character was the dominating reason leading to the establishment of the principle that the form of the judgment was controlling for the purpose of ascertaining its finality."

Georgia Ry. Co. v. *Decatur*—error to Georgia Supreme Court, in proceeding for injunction. "The rule is established that in order to give this Court appellate jurisdiction the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.'"

Gulf Refining Co. v. *United States*—appeal from Circuit Court of Appeals. The challenged judgment was held final. "The general rule established by many decisions, of which *Haseltine* v. *Central Bank of Springfield* (No. 1), 183 U. S. 130, is an example, is that the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final. But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length. *Metropolitan Co.* v. *Kaw Valley District*, 223 U. S. 519, 523. Under the stipulations above recited, the trial court was bound

to enter decrees for the government for the stated sums of money if that court found that the government was entitled to recover the net value of the oil produced. The trial court found that the government was not so entitled and the decrees went accordingly. Turning to the opinion, it will be seen that the circuit court of appeals decided that the trial court erred 'in entering the decrees denying the complainant the right to recover the net value of the oil, etc.' The instruction for further proceedings not inconsistent with the opinion, therefore, was equivalent to a direction to render judgment for the net value—that is, for the exact sums set forth in the stipulations. See *Moody* v. *Century Bank*, 239 U. S. 374, 376; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 241. There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. It follows that the jurisdictional objection is without merit."

The judgment of the Supreme Court now before us is not final in form and I think inspection of the opinion does not definitely indicate the action which the District Court of Cascade County would have been bound to take. In his original petition against the Surety Company as sole defendant Mieyr prayed for judgment upon his claim, for appointment of a local receiver to take charge of Company assets, etc. And during the progress of the cause sundry questions were interposed by intervenors. Others may appear and amendments may be offered. We have no jurisdiction.

If, however, the judgment below be treated as final, then we must ascertain, if possible, what was actually determined. Our function is to review adjudications, not mere expressions of opinion or unnecessary statements.

Apparently, the Supreme Court definitely adjudged that the trial court lacked power to appoint a receiver for the corporate assets within the State at the instance of Mieyr, a mere general creditor. Consequently the particular orders complained of by Williard and others were invalid as they had claimed. Determination of that question of State law gave adequate basis for disposition of the cause. It is enough to support the judgment and is not reviewable here. Discussion of federal questions was unnecessary and views of the court in respect of them are not presently important.

In any event, it seems reasonably clear that the only federal question before the Supreme Court of Montana which may be open for our consideration concerns the effect of the Iowa statutes and court decree under which Clark became Receiver. It accepted the view that his appointment or designation did not operate to vest him with adequate title to the property of the defunct Company wherever situated, that "such [an] involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment, where the rights of domestic creditors are involved, if the receiver has not obtained possession of the property and where the creditors have obtained rights or liens upon the property even after the appointment in the foreign jurisdiction." Probably this conclusion was erroneous. It involved a federal question. At the most we should announce the correct rule with the reasons therefor and send the cause back to the Supreme Court of Montana for further proceedings not in conflict with our determination. But this Court is neither called upon nor can it, without impropriety, discuss mere questions of State law which may hereafter be presented for decision by the courts of Montana. It is not our function to suggest to state courts how they should interpret their own laws. Theirs is the duty of deciding such matters, ours requires forbearance from tendering advice in that regard.

The writ of certiorari should be dismissed.